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2511  
No. 11820

IN THE

**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

*see vol. 2510*  
TAVARES CONSTRUCTION COMPANY, INC., a  
corporation, CONCRETE SHIP CONSTRUCTORS,  
a joint venture, STROUD-SEABROOK, a copartner-  
ship, LLOYD S. STROUD, R. S. SEABROOK,  
C. M. ELLIOTT, CARLOS TAVARES, HENRY  
M. PAGE and DON F. GATES,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

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**TRANSCRIPT OF RECORD**

(In Four Volumes)

**VOLUME III**

(Pages 741 to 1108, Inclusive)


Upon Appeal From the District Court of the United States  
for the Southern District of California  
Southern Division

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(Testimony of Carlos Tavares)

Q. By Mr. John M. Martin: You are familiar with Exhibit W, the original Tavares Construction Company lease, and with all amendments? A. Yes.

Q. And the provisions thereof? A. Yes.

Q. Will you take into consideration such provisions in giving us your opinion as to what is a fair and reasonable supervisory fee for the services here rendered by the contractor to the Defense Plant Corporation, in connection with the construction of the particular facilities, machinery and shipyard here involved?

A. The provisions in the agreement—

Mr. Landrum: Just a moment. Now, if the court please, he is not answering the question.

Q. By Mr. John M. Martin: You are not asked for the provisions. You are asked if you have an opinion as to a fair supervisory fee, and to which you answered you did have? A. Yes, sir.

Q. Now, I ask you to state that opinion either in dollars or in percentage. A. It is 10 per cent.

Q. Ten per cent of what?

A. Of the actual construction costs.

Q. Will you state upon what you base that opinion? [454]

A. That is a minimum fee that a contractor is entitled to when he builds anything for a guaranteed cost.

Q. What have you included within the 10 per cent, if anything, for designing or other engineering services?

A. I did not include anything for designing or engineering services. If I had to go out and get engineering services, I would probably have to pay the engineer, oh, about two per cent.

(Testimony of Carlos Tavares)

Q. Two per cent?

A. Two per cent for his services.

Q. Based upon the same aggregate total of the same actual cost?

A. It would be based upon the total cost of the job, which would include our fee. The actual engineering fee would be 5 per cent, but 3 per cent of which the engineer would spend probably for other engineers and costs in running his office, and so forth. [455]

Q. By Mr. John M. Martin: Is that the reason you have made a deduction from 5 to 3 per cent and stated, in your opinion, it is 2 per cent as an engineering fee from the time the shipyard was completed and actual ship construction work begun? A. Yes, sir.

Q. What were your duties in connection therewith?

A. I went to work every morning at 8:30.

Q. Where?

A. At the shipyard; went home for dinner; came back and stayed there to about 11:00 o'clock, seven days a week, every day of the year, for about two and a half years.

Q. You didn't take any time off for trips to Washington to interview the departments?

A. That was all.

Q. What was the general nature of your duties while you were on duty at the shipyard or thereabouts?

A. I poked my nose into everything. There were no particular duties I had.



(Testimony of Carlos Tavares)

Q. Well, were you the managing or executive head of the Concrete Ship Constructors?

A. We were a joint venture, a partnership, so to speak, and Mr. Seabrook and I and later on Mr. Elliott all participated in the management of the shipyard.

Q. Were you then and are you now the owner of any un-[456] divided interest in the Concrete Ship Constructors, the joint venture?

A. Yes, sir; I am an owner of an undivided one-fourth interest in that Concrete Ship Constructors.

Q. And did the Tavares Construction Company own the leasehold estate here involved, for the use and benefit of the joint venture?           A. They did.

Q. When you say that you poked your nose into everything, did you mean by that that you were at all familiar with the actual condition of these facilities and machinery, as of December 23, 1944?

A. Yes, sir.

Q. What was the general condition of the facilities and machinery as of that date?

A. It was in very excellent shape because we were doing—well, it was in very good shape.

Q. At that date did the Tavares Construction Company or Concrete Ship Constructors as lessee require the further substantial use of those shipyards for the completion of the then existing contracts with the United States Government for construction of ships?

A. There was a lull right at that time. All we had was two ships left to complete.

Q. How many had you theretofore completed and delivered [457] out of this yard?           A. 47.

(Testimony of Carlos Tavares)

Q. And what was the state of completion of the two remaining vessels as of December 23, 1944? I have in mind not the details but any fact which would tend to show whether or not any substantial use of the facilities and machinery would be required thereafter for the purpose of completing said last two ships.

A. That was December 23, 1944?

Q. Yes, sir.

A. I believe we were—or I don't remember exactly but I believe that one of the ships was at the dock and the other one was in the outfitting pier. I would say only probably 80 per cent of the yard was actually being used.

Q. What per cent?

A. I mean only 20 per cent of the yard was actually being used.

Q. On what date, if you know, was actual completion of the two remaining ships advanced to the state where a larger minor percentage than 20 per cent of the total shipyard was required for their completion?

A. I can find that out for you but I don't remember exactly. But I think it is—

Q. Don't guess at it. Do you happen to know the date of actual completion of those two ships? [458]

A. Yes; they were finished some time in May, I believe.

Q. Of 1945?

A. Well, I am not sure about that, either.

Q. Have you an opinion, from your knowledge and familiarity with the shipyard and its facilities and machinery, and your general experience in designing and layouts, and your knowledge of the site location, to enable you to form an opinion as to the fair market value of

(Testimony of Carlos Tavares)

the facilities and machinery, excluding therefrom any valuation of the site or land upon which they are based, as of December 23, 1944?

A. Will you please repeat that question?

(Question read by reporter.)

Mr. Landrum: The answer is yes or no, please.

Q. By Mr. John M. Martin: Have you an opinion?

A. Yes.

Q. Will you state in dollars that opinion?

Mr. Landrum: If the court please, I have an objection here which I desire to make to that question. I don't know whether your Honor desires that I make it in the presence of the jury or not.

The Court: I think so.

Mr. Landrum: If your Honor please, it is objected to on the ground and for the reason, first, that it is a giving of a valuation on only a portion of the whole, with no alloca-[459] tion and no evidence going to show what relationship that has to the whole; in other words, a valuation of only a portion of the thing with which we are here concerned, given separately; second, upon the ground and for the reason that it goes to the question of the valuation of this leasehold interest and option, and that any value to be given this lease, coupled with an option, can only be based upon speculation and conjecture by the very terms of the instrument itself; third, that any value which may be given to this lease, coupled with an option, must include, within itself, an improper element, the value of a so-called option which never came into existence; fourth, that such value must include, within itself, some element or increment for the so-called option, and an option is not an interest in real property such as may be



(Testimony of Carlos Tavares)

compensated for in a condemnation case; fifth, that such value, including within itself an element or increment for the so-called option, is improper because it would require the government to pay for something it has itself made. No value could be attributed here except by virtue of this very condemnation case itself.

The Court: Of course, several of these specifications have already been ruled upon by the court in its other rulings, which are in the record. The ruling on the pre-trial was a ruling that was effective as to certain portions of the objection now interposed, and this court is not going to at-[460] tempt to review a court of coordinate authority in the same case. Manifestly, the answer must be limited to the facilities and machinery that were component parts of the project. So that that portion of the objection has no merit. But it is a question of argument to the jury on the factual deductions to be made from whatever answer may be given after further exploration of the elements that are necessarily included in the question and must be included in the answer. Of course, ladies and gentlemen, the jury cannot speculate or conjecture or guess about values in a condemnation suit. They must not imagine things that will exist in the future because that is not a fair basis of estimating value, for the very apparent and obvious reason that the human mind is finite. We haven't reached the stage of perfection in mental acquisition, where we can foretell and look into the future with definiteness, with certainty. So that, in law, there must be a standard, a fixation, a definiteness, reasonably compensation to which a litigant is entitled. And you must remember that at the time for you to apply this evidence. That rule must be kept constantly in mind,

(Testimony of Carlos Tavares)

and you are not to emerge from reasonable probabilities discernible from evidence into imaginary speculation or conjectural attitudes not sustainable in law. Otherwise, the objection is overruled.

Mr. Landrum: If your Honor please, I would like to [461] have the record show a specific exception to your Honor's ruling.

The Court: It may so show.

Q. By Mr. John M. Martin: You may answer in dollars, Mr. Tavares, your opinion. A. In 1944—

The Court: That is December 23, 1944.

The Witness: December 23, 1944, those facilities were worth approximately \$500,000 more than the option price set forth in the Defense Plant agreement.

Q. By Mr. John M. Martin: Are you referring now to the option price as calculated by Mr. Gregory Smith and here in evidence as Exhibit Q?

A. \$2,145,000, and add another \$500,000 on top of that is \$2,6—whatever it is.

The Court: Let's have that read.

(Answer read by reporter.)

The Witness: \$2,645,000.

The Court: What is your answer to the question? The question was clear and specific.

The Witness: \$2,645,000.

Mr. John M. Martin: May I refresh the witness' recollection, your Honor, by showing him an exhibit which I have here?

Mr. Landrum: I object to that cross examining his own witness. He has already answered it.

The Court: Of course, the jury must consider the answer of the witness as he gave it; that is what you are

(Testimony of Carlos Tavares)

here for, ladies and gentlemen; not to sit here as automats and take figures, but you are to use your processes in discerning the recollections and all of the other features that go to make up the value of evidence that is given by a witness. Proceed.

Q. By Mr. John M. Martin: Will you state the basis for that opinion?

A. In there, I have added my fee of 10 per cent and 2 per cent for engineering and the increased cost in construction, from 1942 to 1944.

Q. Have you calculated or prepared any estimate as to the fair replacement cost of these facilities and machinery as of December 23, 1944?

Mr. Landrum: Will you go a little slower? I am having to write this down.

The Court: You have a reporter here who can get it all. Go right ahead, Mr. Witness, but eliminate the argument and deductions. We have a lot of lawyers here and we will probably listen to a lot of argument. So we must confine witnesses to testimony.

The Witness: By adding all these values together, I arrived at the figure of \$750,000 as being a very fair price for any willing buyer in 1944 because right at that time the [463] facts show that there was a war on and the facts show that thousands of ships were returning to this country to be repaired; the facts show that there weren't any of the yards suitable and capable of taking on a large volume of work.



(Testimony of Carlos Tavares)

Q. How many men could reasonably work in this yard on the number of ships customarily worked on?

A. We have worked 4,000 men at this yard and we have worked 500.

Q. Is there any feature of the yard or any element in the designing where you intended to take into consideration and so design the yard that it might be readily adaptable to use 500 men working there or as many as 4,000 men working there?

A. Yes; we took that all into consideration. We have worked economically with 500 men, 3,000 men and 4,000 men. Our records prove that.

The Court: Mr. Martin, if you are going to pursue any other line of inquiry, we will take our recess now.

Mr. John M. Martin: Just one more question and I am through.

The Court: All right.

Q. By Mr. John M. Martin: Mr. Tavares, when you spoke of taking into consideration the rent-free use provision or the use under this lease, I will ask you if that rent-free use to which you referred is limited to the use of this yard [464] and its facilities for the construction of ships for the government.

A. Yes, sir.

Mr. John M. Martin: That is all.

The Court: We will take our recess, ladies and gentlemen. Remember the admonition which I have heretofore given you. Please occupy the jury room.

(Short recess.) [465]

(Testimony of Carlos Tavares)

The Court: All present. Proceed with the cross examination.

### Cross Examination

By Mr. Landrum:

Q. Mr. Tavares, am I correct in my statement to you of your conception of the meaning of market value, that that means that, in your opinion, whatever interests you and your companies may have by virtue of Exhibit W, which is known to you and I as Plancor 407, would sell on the open market for cash on the 23rd day of December, 1944—

Mr. John M. Martin: If the court please, I object to the question unless it is limited to interests in this property here sought to be condemned. He says, "whatever interests."

Mr. Landrum: I am perfectly willing to limit it to that.

Q. By Mr. Landrum: Is that what you mean?

A. By market value I mean a willing seller to a willing buyer who would buy my leasehold estate.

Q. That is right. In other words, to boil it down, it is your opinion that you could get that much money for an assignment of whatever rights you had in this property under that lease and option agreement; that is what you mean?

A. I have told you on certain assumptions. [466]

Q. Yes. Well, I understand that, but that is what it boils down to. isn't it? A. No.

Q. What is it, then? A. It is my interests—

Q. Yes, it is. A. —in the leasehold estate.

(Testimony of Carlos Tavares)

Q. That is right. And whatever interests you have stem from your agreement with the Defense Plant Corporation?      A. Correct.

Q. That is right, all right. Now, Mr. Tavares, do you have a copy of this exhibit W?      A. No.

Mr. Landrum: I believe the jury has copies of this exhibit.

The Court: I believe you all have them, ladies and gentlemen.

Mr. Landrum: The record will show, if the court please, with the court's permission, that Mr. Martin has just handed to Mr. Travares a copy of Exhibit W.

Q. By Mr. Landrum: Now, Mr. Tavares, let's you and I go over the instrument which you say has a market value of \$750,000. Go with me to paragraph 9 of that exhibit. In arriving at your conclusion with relation to the fair market value of what you could sell this instrument for, or your [467] interests under it, did you take into consideration the provisions of paragraph 9 thereof?

A. Yes, I did.

Q. Paragraph 9 provides, does it not:

"No salaries of Lessee's executive officers, no fees of its attorneys, no part of the expense incurred in conducting Lessee's offices and no overhead expenses of any kind shall be included in the cost of leasing the Site or the Programs, except that direct expenses of Lessee's Officers or employees and fees of attorneys retained or employed by Lessee in connection with the Programs may be so included to the extent approved by Defense Corporation."

A. Correct.

Q. You understand that?      A. Most certainly.

Q. Your salary,—you are an executive officer, are you not, of this corporation?      A. Surely.



(Testimony of Carlos Tavares)

Q. Your salary, according to your bookkeeper, was charged to and paid for out of the money that the Defense Plant Corporation put in here, was it not?

A. "may be so included to the extent approved by the Defense Plant Corporation" and was so approved. The [468] salary of \$6,000 was for five individuals working for a whole year to build \$2,900,000 worth of facilities.

Q. Now, Mr. Tavares, it is a fact, is it not, that you and Mr. Seabrook, and a number of the executive officers of your companies, did pay to yourselves out of the money that the government of the United States put up here, your salaries while you were doing this construction of that shipyard? Just tell me "Yes" or "No."

A. Certainly.

Q. You, therefore, violated the terms of this agreement in the beginning, did you not?

Mr. John M. Martin: To which I object as not a proper question, and an insinuation, particularly in view of the record, counsel having stipulated that Exhibit W, as received in evidence, correctly sets forth the actual costs and the option price.

Mr. Landrum: I did agree to that.

The Court: The objection is sustained.

Q. By Mr. Landrum: Now, Exhibit Q was a tabulation, and I believe the jury has the tabulation, and that was taken from the actual invoices, the actual accounts that you gentlemen submitted to the government of the United States and which it paid; that is right, is it not?

A. As audited.

Q. But they paid it? [469] A. Yes.

Q. All right. I want to show you this little memorandum here.

(Testimony of Carlos Tavares)

Mr. John M. Martin: May I see it before you show it to the witness?

Mr. Landrum: Yes. That is one of the sheets that was made from.

Mr. John M. Martin: No objection.

Mr. Landrum: Your Honor, please, I did not intend to offer it in evidence, but counsel says he has no objection.

Mr. John M. Martin: No, I said no objection to showing it to the witness.

The Court: I haven't the slightest idea what it is. Let me see it. Perhaps I may see an objection to it.

Mr. Landrum: I was not going to offer it in evidence, but I was simply going to show it to this witness so I would not confuse him.

Q. By Mr. Landrum: Mr. Tavares, Exhibit Q, of course we know was made from the actual invoices.

A. I thought you were going to show that to me.

Q. I will be glad to. That is No. 2 of 11(d); that is a copy of one of them; that is right, isn't it?

A. Yes.

Mr. Landrum: Now, could I go up there so that he and I could both look at it? [470]

The Court: Yes, just so each of you gentlemen will be properly respectful to each other.

Mr. Landrum: Yes, sir. I will be very happy to get along.

Q. By Mr. Landrum: Now, this is what we term service charges, is it not?

Mr. John M. Martin: Just a minute. I object to counsel reading into the record in this case anything that has not been received in evidence.

(Testimony of Carlos Tavares)

Mr. Landrum: I am not reading it in the record.

The Court: How can a jury discern what it is unless it is before them?

Mr. Landrum: Well, I will withdraw the question.

Q. By Mr. Landrum: Attorney's fee, \$50, who got that?

Mr. John M. Martin: To which I object as not any evidence in this case that anybody received it.

The Court: If the audience cannot conduct themselves with propriety; they will have to leave the room. We don't want any indication in the court room as to how they feel about the evidence.

Mr. John M. Martin: If the court please, I appreciate your admonition.

The Court: Mr. Bailiff, you will see that order is enforced, and if the men can't sit here in the court room [471] quietly, without exhibiting their emotions, they will have to leave the court room. That means all of you.

Now, will you read the record, Miss Reporter?

(The record was read.)

The Court: The objection is sustained.

Q. By Mr. Landrum: Mr. Tavares, I understood you to say that this lease and option was your pay or your supervisory fee for the construction of these facilities; is that correct? A. I didn't say that.

Q. Well, isn't that correct?

A. What do you mean by that?

The Court: Raise your voice, gentlemen, so that we can hear what you say, both of you.

Q. By Mr. Landrum: Is it not the claim of the Tavares Construction Company in this case that the consideration for the execution of Exhibit W by the Defense



(Testimony of Carlos Tavares)

Plant Corporation was to cover your supervisory fee for the installation of these facilities and the building of this shipyard?

A. This agreement says that I am only allowed to charge such expenses, either salaries or legal expenses, that the Defense Plant Corporation's auditors will allow, and that we should charge no other fees for supervisory services in this agreement. We have followed this to this extent, that [473] this has passed through the hands of all the different boards, renegotiation boards, auditors of the Defense Plant Corporation, auditors of the Maritime Commission and found correct.

Q. We don't deny that.

A. That we have lived up to this agreement of lease.

Q. All right. Now, in the list which was paid for the construction of this shipyard is an item, "Consultant's fee, \$25,678.21,"—did any of the officers of your company receive any of that \$25,000?

A. I don't know what this Consultant's fee is, but I can assure you that no officer in the corporation ever received \$25,000 out of this agreement for any lease whatsoever. I would like to find out what that is. You will find out those are probably the way they had worked this out.

Q. You did, however, pay your consultants this money?

A. I am sure we only paid a fee to Dames & Moor of about five or six hundred dollars, and if that thing was set down as consultant's fees, it is all wrong.

Q. It is your own record, isn't it?

A. Well, in order to clarify that, I think we should bring in the records. That isn't correct. We will bring them in.

(Testimony of Carlos Tavares)

Q. Here is an item charged here, for which the Defense Plant Corporation paid, "Construction Supervision [473] Not Distributed, \$1,257.69." What does that mean?

A. It means that—under normal contracts you have people that build something, and you have inspectors. Now, the Defense Plant Corporation and the Maritime Commission, through the fact that they didn't have any, asked us to hire these men so that the work should proceed properly. That is a real true job cost.

Q. It was then paid for supervision to someone?

A. It was not supervision. It was inspection.

Q. All right. Here is an item, "Purchasing, \$9,433.-64." Who did that purchasing?

A. The Tavares Construction Company did the purchasing. That is very cheap.

Q. Did you say, "That is very cheap"?

A. Yes.

The Court: Keep your voice up, so that we can all hear you.

Q. By Mr. Landrum: "Miscellaneous general expenses, \$28,129," do you have any idea what that was for?

A. It is just what it says, Miscellaneous general expenses, such as telephone, telegraph. You will notice it is telephone and telegraph, and other things that you can't allocate. They are all perfectly all right, audited and passed on by everybody.

Q. But these items were included and paid for by the [474] government of the United States?

A. We followed this book.

Q. All right. Let's follow it now. Go with me to paragraph 12, the second paragraph under that, of Ex-

(Testimony of Carlos Tavares)

hibit W. In arriving at your conclusion with relation to the fair market value of the interests which you acquired hereunder, do you think that you could sell your interests with that paragraph in it for \$750,000 on the 23rd day of December, 1944, to an informed and willing buyer?

A. What does the paragraph say?

Q. It says, follow me:

“This lease or any extension thereof under this paragraph Twelve may be terminated by the parties hereto in the manner hereinafter set forth.”

And this is the thing I want you to follow:

“At any time when substantial use by Lessee of the Site Facilities and Machinery shall be no longer required to enable Lessee to construct boats for the Government . . .”

You only had this lease for the purpose of constructing boats for the government; is that right?

A. No, I have got an option to buy this thing too.

Q. But it provided, however, that the whole thing could be canceled under paragraph 12, did it not?

A. It provides that it can be canceled by the government. [475] It also provides that I could cancel it “when substantial use by lessee of the Site Facilities and Machinery shall be no longer required to enable Lessee to construct boats for the Government.” One day before the condemnation suit my shipyard was not substantially used for constructing boats for the government.

Q. That is right. As a matter of fact, on the 23rd day of December, 1944, you only had one outstanding contract for the construction of boats for the government, did you not? A. Yes, sir.



(Testimony of Carlos Tavares)

Q. And on that contract you only had two more boats to build, did you not? A. That's right.

Q. And those two boats, according to your own testimony, were completed and delivered to the government on or about the 10th day of May, 1945?

A. That is right.

Q. All right. Do you think that you could find a willing buyer to pay you \$750,000 for the right to construct boats for the government, unless he had his contract to build boats for the government?

A. On December 23, 1944—are you through? You are asking me a question?

Q. Go ahead, yes, sir.

A. On December 23, 1944, if the government—I can't say that, can I? Or, can I? [476]

Q. I don't know. You know the court's ruling, Mr. Tavares, as well as I do.

A. I could have elected to terminate my lease. The government did not elect to terminate the lease, according to this program.

Q. That is right.

A. Otherwise—

Q. But at that time you are selling it like this.

Mr. Crouch: He hasn't finished his answer.

Mr. Landrum: I beg your pardon. Now, if your Honor please, I want to conform absolutely to the rule. I don't know whether this witness understands your Honor's ruling on this question or not.

Q. By Mr. Landrum: You understand we are concerned here with a date, December 23, 1944?

A. Right.

(Testimony of Carlos Tavares)

Q. You understand that, to put it in the parlance of the street possibly, that there was a termination there?

A. No, a condemnation.

Q. A termination of your rights under your lease, and it is what you had at that time that you are now valuing; isn't that right?

A. That's right.

Q. All right. All you had was a contract to complete two more ships for the government? [477]

A. No, I had a contract with the Defense Plant Corporation, a branch of the government, that it is going to give me certain things, which they took away from me.

Q. All right. And whatever it was that you had is set forth right in the language of Exhibit W, isn't it?

A. They didn't follow this contract.

Mr. Landrum: Now, if the court please, I move that that answer be stricken and the jury be instructed to disregard it.

The Court: That will go out, ladies and gentlemen, and be disregarded.

Q. By Mr. Landrum: There was contained in Exhibit W a provision with relation to the amount of rent which you would have to pay under it, was there not?

A. Yes, sir.

Q. That provision, I don't think we need read it. I will cite it to you, if you wish, but we can talk about it. It is paragraph 13.

A. Okay. Go ahead.

Q. Paragraph 13. That provision provided that as you built and completed a ship from the moneys which the government was to pay you for that ship you were to pay them certain rental, out of the money you got for the ship; that is right, isn't it?

A. That is correct. [478]

(Testimony of Carlos Tavares)

Q. You sold these ships to the government of the United States; that is right, isn't it?

A. That is right.

Q. When you would sell a ship, out of the money you were going to get would come back to the government of the United States as rental a portion of the \$2,700,000 it put up to build that shipyard; is that right?

A. That is common practice.

Q. I understand. But that is the situation, isn't it?

A. It is common practice when I build a house.

Q. All right. The amendments to Plancor 407 provide for an increase in that rental as to each ship, do they not?

A. Yes, or you mean on certain amendments there was more money on certain ships?

Q. Yes. We will get together on the situation. As you went along it took more money? A. No.

Q. Well, you got clear up to \$2,700,000?

A. That was because the program changed as it went along. Many ships were needed. May I explain that?

Q. Yes.

A. The program changed as we went along. For instance, they analyzed certain things, and they wanted more ships, they wanted ships faster, they wanted more things in the ships. The Navy came along and wanted to change the ships [479] and requested certain features, and when the government changed their mind, and we required facilities there, we agreed on a price to build those facilities.

Q. As a matter of fact, you started out with \$404,000 and when you got through it had gone up to \$2,700,000?

A. Sure. The government changed its mind as we went along.



(Testimony of Carlos Tavares)

Q. And you agreed with the change?

A. They needed the ships and we delivered them.

Q. And you were paid for them?

A. Certainly, it was paid for.

Q. Your rental under paragraph 13, when you started out, was \$83,327 each time you delivered a ship; that is, they kept back that much money, and for which you were to pay rent?

A. They kept back nothing. They paid us, and we paid the Defense Plant Corporation.

Q. You paid it, all right. When you got up to where you got \$2,700,000, I am talking in round figures, in this project, the rental which you were to pay down here increased until you paid them \$140,000 for each ship.

A. Yes.

Q. Now, Mr. Tavares, your whole rental price and agreement was contingent on how many ships you built, wasn't it?

A. No, sir. We built 49 ships. 27 of those ships had [480] free rental.

Q. That is right. After you got 22 ships built, you built more for the government and sold them to them and didn't have to pay any rent; that is right, isn't it?

A. Correct.

Q. That is right. But if you weren't building ships for the government, you didn't have this property rent free, did you?

A. I didn't want to build ships for any other than the government during the war.

Q. But if you say you had the leasehold rights in this property, that you had that lease, you didn't have any right to use that property for any purpose except build-

(Testimony of Carlos Tavares)

ing ships for the government, unless you paid rent, did you?

A. It doesn't say that in this lease. The only thing it says in this lease is that I have the option to buy when the thing is to be terminated.

Q. You say it doesn't say that?

A. No, sir. It says for boats for the government. It doesn't say for anybody else.

Q. That is right. What I am getting at is this, and I don't think we are in disagreement on it: You had to pay rent and you had to get the permission of the Defense Plant Corporation and the Maritime Commission to use this yard for any purpose other than to build boats for the government, [481] didn't you?

A. I had an agreement which I lived up to.

Q. That is right. But you had to do that, didn't you?

A. So did they, to give me back my option.

Q. Now, it is your opinion that with this provision in there that you had to be building boats for the government or otherwise you had to get their permission and make an arrangement with them, and you still think you could have sold this lease in the open market for \$750,000?

A. Without any question of a doubt.

Q. All right. Are you, Mr. Tavares, basing your opinion with relation to the fair market value of this property on your own ability to sell it?

A. No, sir. All I have to do is to go and say: 5 cents a square foot in Los Angeles for the same piece of property.

Mr. Landrum: I move that that answer or that portion of the answer, rather, in which he recites that he could have bought the same piece of property in Los Angeles for 5 cents a square foot—

(Testimony of Carlos Tavares)

The Witness: I didn't say that.

Mr. Landrum: —be stricken out.

The Court: Yes, the motion is granted. That will go out and be disregarded.

Q. By Mr. Landrum: Now, Mr. Tavares, will you go [482] with me again to the instrument from which your rights stem, in other words, Exhibit W, in paragraph 14 thereof,—paragraph 14. Were you familiar with the terms of that paragraph when you stated your opinion with relation to the price for which you could have sold this instrument on the open market for cash? Are you reading paragraph 14?

A. Yes, I am. Yes, surely.

Q. All right. Now, that paragraph says that the "Defense Corporation, by notice in writing with the approval of the Maritime Commission noted thereon, may, in addition to all other rights with reference to termination under paragraph twelve hereof, cancel this lease or extension thereof, in the event (a) all or substantially all of Lessee's contracts with the Government, at any time outstanding, for the construction of concrete barges and other boats shall be terminated or cancelled prior to completion," does it not?

A. If that shall be terminated or cancelled.

Q. It provides that the Defense Corporation can cancel that instrument at any time that your contracts for the construction of concrete barges and other boats shall be terminated or cancelled, does it not?

A. Yes, if I don't live up—what it means here is if I don't live up to my contracts with the Maritime Commission, and don't do a good job, then, of course, they can cancel. If I have lived up to all of the conditions and



(Testimony of Carlos Tavares)

terms, [483] and the conditions of that agreement and my other contracts—well, three shipyards were terminated.

Q. The only contract you had, Mr. Tavares, on the 23rd day of December, 1944, was a contract upon which you only had two more boats to complete, and they were substantially completed at that time, or were at least completed in May, 1945?

A. Right. They didn't terminate that contract though.

Q. No, I understand. They could have though, couldn't they? A. They wouldn't.

Q. Why didn't you terminate it?

A. I can't terminate a contract. I am talking about the boat contracts. I am talking about the ship contract.

Q. All right. If your rights under that contract were worth \$750,000, why didn't you say to the government of the United States, "I desire to exercise my option"?

A. Because I wanted to keep it, because I had free rent until 1949.

Q. You did? A. Yes, sir.

Q. Where do you find that in the instrument?

A. Yes, building boats for the government.

Q. Yes, building boats for the government.

A. Well, I can still be building—oh, that is not [484] allowable here.

Q. Yes. Now, there is a provision in here further, is there not, that under paragraph 14, and this is under sub-paragraph (b) under 14, that "the Government shall request priority for itself or others with respect to the use of the facilities to be provided hereunder, and Lessee

(Testimony of Carlos Tavares)

shall fail or refuse to give such priority,"—then they could cancel it, couldn't they?

A. They could cancel, like they could condemn it, but I still maintain certain rights, that I have given up for that option.

Q. That is right.

A. Certain rights I have here that are definite.

Q. What did you pay for them?

A. My services, for one thing.

Q. All right. A. My time for another.

Q. Yes. A. It is worth a lot of money.

Q. Your services and time for supervising the construction of a shipyard which is to build ships and to sell them to the government of the United States; that is right, is it not?

A. That is correct. Isn't a man entitled to a fee?

Q. You made a fee, didn't you, Tavares? [485]

A. Not on this.

Q. Didn't you tell this court and jury that, in your opinion, a fair supervisory fee for the construction of those facilities was 10 or 12 per cent?

A. Certainly. Certainly, for a guaranteed cost.

Mr. Landrum: Your Honor please, my practice is to ask the clerk to mark the exhibits first, but is it the practice first to show it to the witness?

The Court: Either way. The clerk can mark it.

Mr. Landrum: Would you be good enough to mark that for identification?

The Clerk: Plaintiff's No. 2.

(The document referred to was marked Plaintiff's Exhibit No. 2, for identification.)

(Testimony of Carlos Tavares)

The Court: May I see it, please?

(The document was handed to the court.)

Q. By Mr. Landrum: Mr. Tavares, I show you Plaintiff's, for identification, No. 2, as marked by the clerk of the court.

The Court: Show it to counsel, first.

Mr. John M. Martin: May I see it, first, Mr. Landrum?

(The document was handed to counsel.)

Mr. John M. Martin: No objection. It may be received in evidence.

Mr. Landrum: Your Honor please, at this time, then, [486] there being no objection, we offer in evidence Plaintiff's Exhibit, for identification, No. 2.

The Court: You may read it to the jury, and then have it marked.

(The document, heretofore marked Plaintiff's Exhibit 2, for identification, was received in evidence.)

Mr. Landrum: Ladies and gentlemen of the jury, Plaintiff's Exhibit 2, which is in evidence in this case, reads as follows:

**"CONCRETE SHIP CONSTRUCTORS**

National City, California

"Post Office Box D

Phone Greeley 7-4163

November 21, 1944

"11th Naval District

San Diego, California

"Attention: Capt. Conger, Industrial Manager

"Gentlemen:

"With reference to our recent telephone conversation, regarding our disposition of the option given

us by the Defense Plant Corporation for and in consideration of the construction of the facilities under Plancor 407, please be advised as follows:

"The Tavares Construction Company, Inc., retains an option under an Agreement of Lease with the [487] Defense Plant Corporation for the purchase or acquisition of the facilities at this shipyard on a depreciated basis. This option is in the form of compensation for having constructed approximately \$2,700,000.00 worth of facilities without profit, and we consider this option of some value. It is not the intent or desire of this company to in any way stand in the way of the acquisition of this property by the U. S. Navy, but we are of the opinion that we are entitled to some consideration.

"We will, if desired, further discuss this matter with you at your convenience.

"Very truly yours,

"CONCRETE SHIP CONSTRUCTORS

"R. S. Seabrook

"R. S. Seabrook

"RSS/mel

Managing Partner"

The Court: Now, Mr. Landrum, have the clerk mark it.

The Clerk: Do you want me to mark this as Government's Exhibit No. 3?

Mr. Landrum: Yes.

(The document referred to was marked Government's Exhibit No. 3, for identification.)



(Testimony of Carlos Tavares)

Q. By Mr. Landrum: I believe you have testified, Mr. [488] Tavares, that, in your opinion, the reasonable and fair supervisory fee for the construction of this shipyard would be 10 per cent, plus 2 per cent for something else.

A. For engineering.

Q. Your companies, the companies of which you are a partner, have heretofore stated that three per cent would be a proper fee, have they not?

Mr. John M. Martin: To which I object as a statement of counsel, and no foundation laid for it, and not a proper statement in the presence of the jury.

The Court: Sustained on the first ground.

Mr. John M. Martin: I have no objection to showing this letter to the witness. I will object to the receipt of the letter in evidence, and I would like to approach the bench and state my reasons.

The Court: The court has inspected the exhibit, for identification, No. 3. Proceed with the examination.

Q. By Mr. Landrum: Mr. Tavares, I show you Plaintiff's, for identification, Exhibit No. 3, and I will ask you to examine it and state what it is.

A. Yes.

Q. What is it?

Mr. John M. Martin: If the court please, I object to the witness stating the contents of the letter, if that is the question. [489]

The Court: It speaks for itself, as to what it is.

Mr. John M. Martin: I object to it. It is, apparently, from the face of it, a part of an unaccepted offer of compromise.

The Court: It has not been offered in evidence yet. The objection is sustained to the question.

(Testimony of Carlos Tavares)

The Witness: This is a negotiation—

The Court: Wait a moment, Mr. Witness. Did you hear the court's ruling on that? Proceed with the examination.

Q. By Mr. Landrum: State whether or not that signature—state if you know, of your own knowledge, that is the signature of Mr. Seabrook, one of the partners.

A. Yes, sir.

Q. State whether or not that is a letter written by Mr. Seabrook to the 11th Naval District. A. It is.

Mr. Landrum: At this time, if the court please, we offer it in evidence.

Mr. John M. Martin: To which I object upon the grounds that—

Mr. Landrum: We offer it as Exhibit No. 3, so marked for identification.

Mr. John M. Martin: We object upon the ground that it is immaterial to any issue in this case, and upon the further ground that it is a part of an unaccepted offer of compromise, [490] which resulted from negotiations carried on between the parties to this action for the period of at least one year.

The Court: May I see it again?

(The document was handed to the court.)

The Court: Objection overruled. Read it to the jury.

Mr. Landrum: Yes, your Honor.

(The document, heretofore marked Plaintiff's Exhibit No. 3, for identification, was received in evidence.)

Mr. Landrum: Ladies and gentlemen of the jury, this is Exhibit No. 3, which you will have:

“CONCRETE SHIP CONSTRUCTORS

National City, California

“Post Office Box D

Phone Greeley 7-4163

November 24, 1944

“Eleventh Naval District

San Diego, California

“Attention: Capt. F. P. Conger, Industrial Manager.

“Gentlemen:

“In explanation of our letter of November 21, 1944, and in compliance with Capt. F. P. Conger’s request, we wish to be more specific regarding the considerations for our release of the option held by this company, for the acquisition of certain facilities (i. e., D.P.C. Plancor 407) at National City [491] California, with the Defense Plant Corporation. These considerations are as follows:

“1. To permit this company the free use of existing facilities to complete necessary war contracts.

“2. To permit this company the free use of facilities to carry on ship repair work for Governmental agencies until such time as the Navy needs to convert these facilities to other purposes.

“3. To give this company a contract for the construction of the necessary Navy alterations to convert property to Navy requirements.

“Alternate for Item 3: Make payment to this company in the sum of 3% of the facilities constructions costs, or \$80,000.00, which is equivalent to a

minimum construction fee for constructing the facilities.

“For your information, no fee or profits was allowed us for the facility construction, but in lieu thereof we were granted an option to purchase and the use of the facilities.

“Yours truly,

“CONCRETE SHIP CONSTRUCTORS

“R. S. Seabrook,

“R. S. Seabrook

“RSS/mel”

“Managing Partner” [492]

Q. By Mr. Landrum: Mr. Tavares, it is true, is it not, that paragraph 1, to permit this company the free use of existing facilities to complete necessary war contracts, you had before you, did you not?

Mr. John M. Martin: To which I object, if your Honor please, as no proper foundation is laid and not the best evidence, and it is an attempt to inquire of an arrangement that may have been entered into with some department of the government subsequent to the date of taking.

Mr. Landrum: Pardon me, your Honor. I will withdraw that question.

Q. Now, Mr. Tavares, let's go again to your agreement. “Fifteen: Upon the expiration or termination of this lease or extension thereof pursuant to paragraph twelve hereof, or upon cancellation of this lease or extension thereof pursuant to clause (a) of paragraph fourteen hereof (unless such cancellation shall have been effected because of a violation by lessee of the contracts referred to in said clause (a), lessee shall have and is hereby



(Testimony of Carlos Tavares)

granted, for a period of ninety (90) days after such termination, expiration or cancellation (hereinafter referred to as the 'Option Period') the right and option, by written notice to Defense Corporation and to the Maritime Commission, to purchase all but not part of the site, facilities and machinery at the following prices—" I will leave out A and B—"whichever [493] is the higher." That paragraph is material in your arrival at your figure, is it not?

A. It was arrived at at the depreciated figure that you admitted in court.

Q. But you had to have that figure in arriving at your conclusion with relation to the market value?

A. No.

Q. You didn't? A. No.

Q. Do you mean to say that you did not arrive at your figure with relation to the market value by virtue of a deduction of what this shipyard and facilities would cost as depreciated under subparagraph (b)?

A. I used it but I don't have to.

Q. That is the paragraph that you used?

A. Yes.

Q. You did not attempt in any way to use paragraph (a), did you? A. No; I didn't.

Q. In arriving at your conclusion with relation to the fair market value of your interest under this agreement, did you consider paragraph 22 of Exhibit W?

A. Yes.

Q. Is it your opinion that a buyer willing but not compelled to buy would pay for your interests under this con-[494] tract \$750,000, with paragraph 22 reading, "Twenty-two: Lessee may use such site, facilities, and

machinery only for the construction by lessee of boats for sale to the government, unless otherwise permitted, in writing, by Defense Corporation with the consent of the Maritime Commission noted thereon.”?

A. Why not?

Q. All right. It is your opinion that he would?

A. Yes.

Q. And then were you familiar with the provisions of paragraph 24 of Exhibit W when you arrived at your conclusion with relation to what this interest of yours could be sold for? It is paragraph 24. Do you have it?

A. Yes.

Q. “Lessee will not without prior written consent of Defense Corporation and the approval of the Maritime Commission sell, assign, or pledge this lease or any of its rights or obligations hereunder, or sublease or permit the use by others of any of the property covered by this lease.” With that provision in there, do you think anybody would buy it from you?

A. Mr. Government Attorney, I am arriving at the value of my lease due to the fact of termination and under the assumption that I can terminate and obtain this piece of property, which I am able to get by this termination.  
[495]

Q. Terminated by yourself? Is that what you mean?

A. I can do that. December 22, 1944, I was permitted to do that.

Q. Do you understand what the term “fair market value” means? A. Certainly.

Q. It means the point at which the mind of a willing buyer would meet that of a willing seller, both of them being informed, and having a reasonable time to consummate the transaction? Is that the way you understand it?

A. That is right.

Q. How could it be sold? How could you sell it to a willing buyer with a clause in there providing that you couldn't unless you got the consent of the Defense Corporation and the Maritime Commission?

A. You are talking about something entirely different. I have given a value for my option based on the fact that this option was cancelled and terminated by condemnation. I have lost the rights. By condemning, you have taken these rights from me. And I valued these rights under an assumption I could have sold it and taken up my rights. I think that is pretty clear.

Q. But, under paragraph 24, do you think you could have sold?

A. Certainly. I could have sold with that written [496] consent but I wasn't planning to sell.

Q. You felt that you would be able to get a buyer because you could get the consent of the Defense Plant Corporation and the Maritime Commission to let you sell it to him? Did you feel you could get that consent?

A. Definitely.

The Court: We will take our recess until 2:00 o'clock, ladies and gentlemen. Remember the admonition heretofore given you.

(Thereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p. m.) [497]

San Diego, California, Thursday, February 20, 1947.

2:00 P. M.

(Thereupon the following proceedings were had between court and counsel at the bench, outside the hearing of the jury:)

The Court: Mr. Crouch wanted to speak to the court. I don't know what it is about.

Mr. Crouch: May we assume, your Honor, that there will be no session on Saturday?

The Court: Oh, I think so, this Saturday, but next Saturday, if we are still here, we will have a session.

Mr. Landrum: Your Honor, I would like to state with reference to your Honor's statement that this case controlled by the General Motors case that I wondered whether your Honor was familiar with the fact that that has been modified by the Pettimore case.

The Court: Oh, yes. I am entirely familiar with it.

Mr. John M. Martin: Also, your Honor please, we will try to have our requested instructions here before the end of this session.

Mr. Landrum: We will have ours this afternoon.

Mr. John M. Martin: Ours are being typed.

(Thereupon the proceedings were resumed within the hearing of the jury:)

The Court: The question counsel asked of the court was [498] whether we would have a session of court on next Saturday. Ordinarily we would, but Saturday hap-



pens to be Washington's Birthday, and I know one of the jurors and perhaps more of you, have made some arrangements to take a little recreation on that day. So we will not have a session on next Saturday but if this case prolongs itself into next Saturday, the week following, we will have a session on that day.

Proceed, gentlemen.

CARLOS TAVARES,

called as a witness by and on behalf of the Defendant Concrete Ship Constructors, having been previously sworn, was examined and testified further as follows:

Cross Examination (Continued)

By Mr. Landrum:

Q. Mr. Tavares, in order that I may clear my mind up with relation to your line of reasoning, is it your opinion that this shipyard, in the condition that it was in on December 23, 1944, after having been used for some two years in the construction of ships for the government, would have sold for \$750,000 more than it cost the government under wartime conditions?

A. I didn't say the shipyard. I said my leasehold.

Q. Yes. Well, now, that is the reason I ask, how much of your figure, of the cost of this shipyard to you, did you include for what you say is your right of possession, [499] your right to have that lease?

A. I did not break that down.

Q. You did not break it down?

A. I took it as a whole.

Mr. Landrum: I guess that is all. [500]

(Testimony of Carlos Tavares)

Redirect Examination

By Mr. John M. Martin:

Q. Mr. Tavares, did you take into consideration the fact that, at any time the lessee was not in default under the terms of his lease, he could, by the service of a 10-day notice of his intention to terminate the lease, that he then had the right for 90 days after such termination to elect to purchase under paragraph 15 of the lease?

A. Yes, sir.

Mr. Martin: That is all.

Mr. Landrum: That is all.

Mr. John M. Martin: We will call Mr. Seabrook.

R. S. SEABROOK

called as a witness by and on behalf of the defendants Tavares Construction Company, et al., having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: R. S. Seabrook.

Direct Examination

By Mr. John M. Martin:

Q. State your name and residence.

A. R. S. Seabrook; San Diego, California.

Q. Are you a member of the co-partnership of Stroud and Seabrook, named as defendants herein?

A. That is correct. [501]

Q. Were Stroud and Seabrook members of the joint venture doing business under the firm name and style of the Concrete Ship Constructors? A. Yes, sir.

(Testimony of R. S. Seabrook)

Q. What was your connection with Concrete Ship Constructors personally during the period of its active operation?

A. I was one of the partners of the company.

Q. And to what extent were you familiar with actual construction operations from the time they first commenced construction, the facilities and machinery, to December 23, 1944?

A. I was there on the job during that period of time.

Q. What portion of your total time did you devote to being there on the job?           A. 100 per cent.

Q. To what extent were you personally familiar, on December 23, 1944, with the condition of the facilities and machinery as they then existed?

A. I was there every day. I was familiar with the company.

Q. Had you had previous construction experience wherein you used various types of machinery and equipment?

A. Yes; I have had quite a little previous construction experience. [502]

Q. Over what period of years?

A. I started to work for my present partner Mr. Stroud about 1915, intermittently, and about 1919—I worked for him continuously up to about 1925, when I became a partner of the firm that is now named as Stroud-Seabrook. We were busily engaged in the manufacture of concrete pipe, the installation of irrigation systems and general construction work such as the construction of a portion of Lake Youngs Aqueduct for the City of Seattle, which we did in connection with Mr. Elliott; also the West Seattle Reservoir; 27 miles of the Los Angeles

(Testimony of R. S. Seabrook)

Metropolitan Water District Aqueduct, which embraced canals, 300,000 yards of concrete, and many millions of yards of excavation, circular siphons, the installation of reinforced concrete, fabrication of steel and so forth and, during 1941, I became associated with Mr. Tavares in the construction of these facilities and the construction of ships and repair of ships during the last five years, during which time we received a certificate of achievement from the Navy for—

Mr. Landrum: Just a moment. If the court please, I don't think that is proper.

The Court: I don't know what it would be. Apparently, you know what it would be. I think he shouldn't go into details.

Mr. John M. Martin: I have no knowledge of it, your [503] Honor.

The Court: Eliminate that part of it.

Q. By Mr. John M. Martin: Just limit it to those experiences which you have had that will explain to the court and jury your qualifications to judge of the usability of these facilities and this machinery.

The Court: I haven't any idea what he had in mind but I will ask what was that certificate?

The Witness: That was awarded by the Secretary of the Navy for outstanding performance during the war.

The Court: I think he may state any such awards that he received.

The Witness: And, also, we received the Maritime M award for outstanding production in the construction of concrete ships, and were subsequently awarded two gold stars, each for six months' continued service. My con-



(Testimony of R. S. Seabrook)

struction experience has been general, being of all types of construction.

Q. By Mr. John M. Martin: Have you had experience during the period you mentioned in the estimating of costs of construction of various types? A. Yes.

Q. And has it been a part of your business to keep informed as to the costs of the various types of construction? A. Yes; it has. [504]

Q. Now, will you state to the court and jury, as you observed it, the condition of the facilities and machinery as they existed in this shipyard on December 23, 1944?

A. The facilities were in very good condition.

Q. Will you tell what you mean by "very good condition"? Had they been practically worn out as of that date?

A. We had a substantial maintenance crew in order to maintain the equipment constantly. There are some items of small equipment that, naturally, wear out. There might be some small items like concrete vibrators that might have been eliminated entirely but, generally speaking, the equipment was in very, very good condition.

Q. Have you participated in any way in the keeping of or calculating of costs that were incurred from time to time on this job?

A. I didn't personally keep account of costs. We had a department for that purpose. [505]

Q. Was your familiarity with the condition of the shipyard and the facilities and machinery as of December 23, 1944, such as to enable you to form an opinion as to the fair market value as of that date of the facilities and

(Testimony of R. S. Seabrook)

machinery as they existed on that date? That is a question you can answer "Yes" or "No," Mr. Seabrook.

A. Yes.

Q. Will you state in dollars your opinion of such value.

Mr. Landrum: If your Honor please, I am going to ask your Honor whether I may have the same general objection to each of these questions as put to this witness as I heretofore made? Or, I will be glad to repeat it.

The Court: It is not necessary to repeat it, unless you desire.

Mr. Landrum: No, sir. May I then have the same genral objection that I have heretofore recited to testimony with relation to value as to this witness?

The Court: It may be so understood, and the same ruling.

Mr. Landrum: Yes, sir. And an exception to your Honor's ruling?

The Court: So ordered.

The Witness: Well, in my opinion, the fair market value as of December, 1944 was about \$2,650,000.

Q. By Mr. John M. Martin: Will you state upon what you base [506] that opinion?

A. Well, I base that on many things. I took into consideration the increase in land values between 1942 and 1944, the free use of the property up to the end of 1949, the privilege and right to negotiate for the purchase of the facilities and the site, the opportunity to purchase the facilities and site at a price offered by another prospective purchaser, the privilege and right upon termination of the agreement of lease by either party to purchase the site and facilities, the right to possess the site and facilities by a

(Testimony of R. S. Seabrook)

fee simple title, which automatically permitted us to mortgage or bond or hypothecate the property. Also, I took into consideration the fact that we were entitled to a fee for the construction of the facilities, and also for the engineering of them.

Q. I hand you, Mr. Seabrook, Plaintiff's Exhibit 3, which has been received in evidence, which purports to be a letter dated November 24, 1944, and signed by you. Will you state whether that bears your signature?

A. It does.

Q. Did you personally write that letter?

A. I did.

Q. Will you state how you arrived at the three per cent therein stated for an engineering fee or supervisory fee? [507]

A. Well, that three per cent, amounting to approximately 80,000, was one item which I thought we were entitled to, together with the other items which are enumerated in this letter.

Q. Was that letter ever answered?

A. No, this letter was never answered.

Q. Either in writing or orally?

A. No, this letter was the result of discussions which I had with Captain Conger to the end that we might negotiate a settlement of our controversy, if you might want to call it that.

Q. Had you been informed by Captain Conger of the extent to which the improvements were then contemplated by the Navy?

A. I had not been informed of that by Captain Conger, but—

(Testimony of R. S. Seabrook)

Mr. Landrum: Just a moment. If the court please, that is objected to, first, upon the ground and for the reason he said he had not, he has answered "No" and, second, whatever improvements the Navy have made after the taking is not material.

The Court: I think he has already answered.

Mr. John M. Martin: It is not offered for that purpose, your Honor.

The Court: I think he has answered the question. [508]

Mr. John M. Martin: Yes, I think he has.

Q. By Mr. John M. Martin: At the time you wrote that letter, were you giving consideration to the value to your company that might result, in dollars and cents, were that proposal accepted by the government?

A. Yes. I had—

Q. Just a minute. Now, will you state your opinion at the time you wrote that letter, as to what the fair value, in dollars and cents, in benefit to your company would be in the event that proposal were accepted by the government and the rights therein proposed been granted by the government to you?

Mr. Landrum: Now, just a moment. That is objected to upon the ground and for the reason that it opens up the door to all these transactions that have taken place since December 23, 1944.

Mr. John M. Martin: If the court please, I am not going into any subsequent transactions.

Mr. Landrum: Well, he has asked the question as to what it would have meant to the company in dollars and cents to carry on after December 23, 1944.



(Testimony of R. S. Seabrook)

The Court: I understood him to say "at the date of the writing of the letter."

Mr. John M. Martin: Correct.

The Court: Read the question, please. [509]

(The question was read.)

The Court: Objection overruled.

The Witness: About six or seven hundred thousand dollars.

Q. By Mr. John M. Martin: Upon what do you base that figure?

Mr. Landrum: Now, if your Honor please, may I have that same objection to that question and all the further line of questions going to show that they would have received six or seven hundred thousand dollars for the things that that letter says they wanted the right to do after this taking?

Mr. John M. Martin: It is not offered for the purpose of showing they would have received it. It is offered for the purpose of showing what value the witness placed upon the proposal, if accepted.

Mr. Landrum: May we come up to the bench, your Honor?

The Court: Yes.

(The following proceedings were had between the court, Mr. Landrum and Mr. John M. Martin, outside the hearing of the jury:)

Mr. Landrum: As I understand the question which counsel has asked, it was this: What value, in dollars and cents, did this witness place upon paragraphs 1, 2 and 3 of that letter, in dollars and cents in addition to the \$80,000? [510]

Now, paragraph 1 of that letter provides they shall have further contracts for the construction, and that they shall be able to complete the contracts for boats for the Navy. Second, they shall have some other government work to do. Third, that they shall be awarded the contract for the reconstruction of this yard for the Navy Department.

Now, if your Honor please, if he has opened the door, as I feel he has, then I should be permitted to show that each and every one of those clauses have been complied with by the government of the United States. In other words, the situation is this: They got everything that those other clauses provide, which he was asking for. He did continue to make ships, he did continue to occupy the yard, and in addition to that, he was asked to bid on the reconstruction of this yard by the Navy Department. The government carried out those other provisions.

Mr. John M. Martin: If the court please, if there was a possibility of counsel being able to produce proof of that, it would be different. Counsel has introduced one step in the form of the negotiations or in the progress of the negotiations by the introduction of Exhibit 3. He has apparently offered it, and the court has so accepted it, on the theory that it is an admission against interest on behalf of my client. I propose to show it is not an admission against interest and that the rights set forth would have exceeded in [511] value the amounts they have testified to as to the value of the whole leasehold.

Mr. Landrum: The truth of the matter is, and this witness will so admit, that paragraph 1 was complied with by the government, that he got every right set forth there; that he had every right, and in addition to that that he was working for the—

Mr. John M. Martin: I dispute that, your Honor.

The Court: That is not any reason why the court should exclude the matter from the jury's consideration.

Mr. Landrum: What I am trying to say, your Honor, that if counsel is permitted to show that if the terms and conditions of that exhibit had been carried out they would have been able to make six or seven hundred thousand dollars, that that is what it meant to them, then I should be permitted to show they made that money after December 23, 1944.

Mr. John M. Martin: In order to show that, you will have to show it was after the lease had ceased to exist. We contend they did that work under independent contracts, under various departmental heads, and those contracts are not in issue in this case and are subject to administrative accounting and settlement, and that settlement has not been made.

The Court: You injected that phase into the case, did you not?

Mr. John M. Martin: No. [512]

Mr. Landrum: That is my position.

Mr. Martin: I am only showing that when he offers the letter as an admission against interest, in truth and in fact it is not an admission against interest.

The Court: But isn't the result of that, necessarily, to bring in matters that occurred subsequent to this, and if they do that, you are going to be prejudiced in the Court of Claims. [513]

Mr. John M. Martin: I proposed to make it as a deadline, December 23rd, but I feel that I have a right to refute that as an admission against interest.

The Court: You may have that, but I am telling you now that if you open the door to events that occurred

subsequent to the date of the taking, and there is a verdict that is not satisfactory, you may be prejudicing yourself.

Mr. John M. Martin: I am not going to open the door.

Mr. Landrum: You have got it open now.

Mr. John M. Martin: I am simply trying to show by this witness, and I make an offer to show, by this witness at this time, that at the date he wrote the letter it was his information that there was approximately \$12,000,000 worth of Navy work to be performed.

Mr. Landrum: Later.

Mr. John M. Martin: And that under the terms of the letter, had it been accepted, he would have been in a position to make the competitive bidding for that work, and have had the free use of these facilities. I expect to show by him that what he meant by "free use," is that he didn't mean simply free rent, but he meant free use, free from any insurance, taxes, maintenance, watchmen, and any of the items of expense which were to have been normally carried by the terms of the lease under Plancor 407. I want the witness to explain what he meant by the term "free use," and it was [514] in the letter, and the very valuable rights that had been granted, under which he fixed a minimum supervisory fee of three per cent.

I offer to show that for the purpose of showing the letter, in fact, is not an admission against interest. In so doing, counsel is not asking that the jury consider or that the court consider any event which has occurred subsequent to December 23, 1944.

Mr. Landrum: Counsel has gone still further. He says he proposes to show they would not have to pay for



taxes, for watchmen, and so forth. I have the absolute figures to show where they did pay for them, and they asked the Navy—

Mr. John M. Martin: That is true, if your Honor please, that is under administrative contracts voluntarily entered into between my client and the Navy long subsequent to the time when this contract ceased to exist and they are subject to administrative settlement. There are substantial amounts that changed hands and substantial work subsequent to December 23, 1944, and I do not intend to go into those contracts or to go into the work performed subsequent to December 23, 1944. This is only for the purpose of showing that what counsel says is an admission against interest is, in truth, not such.

Mr. Landrum: May the record, if the court please, show [515] that the exhibit which is in evidence here as Plaintiff's Exhibit 3 is offered by the government of the United States, the plaintiff herein, solely for the purpose of showing that by virtue of that letter an admission was made by the defendants that three per cent or \$80,000 was a minimum fee for their supervision, and for no other purpose whatsoever.

Mr. John M. Martin: I am willing to stipulate it may be received in evidence for that purpose, provided I be permitted to show the manner in which the three per cent was arrived at, by taking into consideration the other very valuable rights therein afforded.

The Court: I do not believe that we should get into an exploration of events that were purely prospective at the time the letter was written.

Mr. John M. Martin: That is right.

The Court: That is what you would be doing, if permitted to open the door, as you say you would like to.

Mr. John M. Martin: No, I don't care to go into it. I only care to go in as far as the three per cent is concerned, on the basis of showing it involved other valuable rights in addition to the three per cent, to show they had a value that they measured, as against the contention that this might be construed as an admission against interest by my client.

The Court: But what the other side will say is, "We [516] want to explore those, to see whether or not they are actually existent." Then don't you get into these other phases of the case?

Mr. John M. Martin: I think I would be entitled to show that those rights, had they been granted, would have had a fair value. That is the extent of our explanation, because he has offered that for the limited purpose of showing it is an admission against interest. I want to prove that, in fact, is not an admission against interest.

The Court: Probably it would be within the realm of proof if you asked him to explain it without going into detail. The other side, however, may not be satisfied with that and will want to go into the door which you open.

Mr. Landrum: If my recollection is correct, I started to ask those questions, the very things he is asking now. I started to take up item 1 and counsel objected to it.

Mr. John M. Martin: I objected to his asking if he received such a right, because he received it subject to departmental agreement subsequent to the time the contract ceased to exist. It was a right received by free voluntary contract subsequent to the date when the lease ceased to exist. It was a right received by free voluntary contract subsequent to the date when the lease ceased to exist, and that is not a matter we can go into in this case.

If the witness is permitted to testify as to the value that he placed on the rights that would have been accorded, that is all I ask to prove by him. [517]

Mr. Landrum: Am I not to be permitted to show he got the rights?

Mr. John M. Martin: If you can show he got them under the terms of the lease, I will make no objection, but if subsequent to it, under other contracts, after the lease had been terminated—

The Court: I do not want to anticipate what will be offered by either one of you, but I am stating that if you do go into this matter, I am not going to foreclose the government from exploring it.

Mr. John M. Martin: Well, I do not want to take the time. I feel that is, in effect, a collateral issue.

The Court: I think you are injuring your own clients' rights by doing that because you will get a record here that would be embarrassing to you in other forums.

Mr. John M. Martin: It would muddy the clear line of demarcation on which we have tried to try the case, and for that reason I shall not pursue the question.

The Court: Very well.

(Thereupon the proceedings were resumed within the hearing of the jury:) [518]

(Thereupon, in the presence of the jury, the following proceedings were had:)

The Court: Proceed.

Q. By Mr. John M. Martin: Will you explain what you mean by free use? Did you mean free rental or what did you mean?

(Testimony of R. S. Seabrook)

(Whispered conversation between Mr. Martin and Mr. Landrum.)

Mr. John M. Martin: If counsel objects, I will withdraw the question. You may cross examine.

### Cross Examination

By Mr. Landrum:

Q. Just one question or two, Mr. Seabrook, please. You have given us as your opinion the fair market value of the facilities, as of December 23, 1944, as \$2,650,000?

A. Yes, sir.

Q. How much of that was land values?

A. For the land itself?

Q. Yes, sir.

A. There is no figure in there for the land itself.

Mr. Landrum: Could I have that exhibit there, if your Honor please?

Q. Here is the thing that is concerning me, Mr. Seabrook. In this exhibit, which we have prepared for the use of the jury, which goes to the question of the depreci-  
[519] ated cost of what we term to be the facilities, there is quite a bit of money that is in that for reconditioning this land, isn't there? All the dredging and everything is in here, isn't it?

A. That is true.

Q. Did you include that in your figure here that you have given us? That is what I am thinking about, sir. You gave us a figure of \$2,650,000 as, in your opinion, the fair market value of these facilities?

A. That is right.



(Testimony of R. S. Seabrook)

Q. Are you including in that the land in its improved condition, including the money that was spent to make that land what it was?

A. I am not including the cost of the site.

Q. Do you know how much money there is included in this Exhibit Q for the dredging and the actual change in the physical condition of that land?            A. Yes.

Q. Tell us how much it is.

A. Two million six—

Q. No. I meant the amount that is in this exhibit here.

A. I don't know what exhibit that is.

Q. Do you know the one we made up for the jury, which shows the depreciated value of these facilities? [520]

The Court: Show it to me.

Q. By Mr. Landrum: What I would like to know, if you know, is how much of that is for dredging and all the work that was done on that land.

A. We have a total over here.

Q. What is the total?            A. \$2,657,067.

Q. Now, let me call your attention to page 3, 11(a), 2113, of the wet dock, \$148,000. That is something that is right there in the land, isn't it?

A. Yes; that is for a dock, covering a dock.

Q. They have got another dock, No. 3—

The Court: That is No. 2.

Mr. Landrum: Yes; No. 2.

Q. \$218,000, and here is another one, \$230,000?

A. Right.

(Testimony of R. S. Seabrook)

Q. That is something that was put in there by the Defense Plant Corporation and is actually a part of the physical land and water, isn't it?

A. It is a part of the land; yes; a hole in the land.

Q. Now, are you including that in your answer—I beg your pardon. What did you say?

A. I said that is a depression in the land.

Q. Are you including that in your figure of \$2,650,000 as the fair market value of what we call facilities or not?

A. Yes.

Mr. Seabrook, have you any way of telling us how much is included in this Exhibit Q for light and power?

A. This one here?

Q. Yes, sir.

A. No; I don't know just how much this exhibit includes for light and power.

Q. Could I have that exhibit? I won't take any more time going over that. You said that you had taken into consideration free use of the property to 1949. By that did you mean that you would have the free use of the property so long as you were building boats for the government?

A. That is true; we would.

Q. And you would not have it unless you were building boats for the government?

A. Unless we were doing governmental work.

Q. If you didn't have government contracts, you wouldn't have the free use of that property, would you, under that agreement?

A. That is true.

(Testimony of R. S. Seabrook)

Q. And you said that you took into consideration and added something for your right to negotiate the purchase. What do you mean by that please, sir?

A. Well, I think it is worth something to be able to [522] sit down with a man, across the table from him, and look him in the eye, and negotiate for a piece of property or an automobile or anything else, especially in view of the fact that you have an opportunity to purchase it at the highest bid that anybody else would see fit to offer on that property.

Q. Don't we all have the right to sit down and negotiate with our neighbor or the owner of the property to purchase his property from him?

A. You don't always have the opportunity to sit down and negotiate with the government.

Q. You have added how much money because you had this right to sit down and negotiate with the government?

A. I didn't put a specific amount down for that purpose.

Q. And then you added to your figure something because you say you were entitled to a fee for the construction of the facilities, did you not?

A. That is true.

Q. How much did you put in or add for your fee for the construction of the facilities?

A. About 10 per cent.

(Testimony of R. S. Seabrook)

Q. In this letter here that you wrote you said that 3 per cent would be a minimum fee, did you not?

A. Yes; but that was just a part of the consideration under that letter. [523]

Q. Now, Mr. Seabrook, just one further question. Is it your opinion that a buyer, willing but not compelled to buy, in his negotiations with a seller, willing but not compelled to sell this land, would be willing to pay him anything as his fee for having constructed a shipyard for himself to build ships in?

A. Why, that is a figure that anybody would normally have to pay. It is added to the cost.

Q. Yes, sir, but now we are thinking about market value. You understand that market value is the price that would be arrived at between a buyer willing but not compelled to buy and a seller willing but not compelled to sell, both being informed, and given a reasonable time to consummate the deal?

A. Yes, sir.

Q. Now, from the standpoint of that buyer, do you think he would be willing to give you anything as your fee for having constructed a shipyard in which you, yourself, built ships?

A. I certainly think he would if he knew that there wasn't any fee included in the other price.

Mr. Landrum: Thank you, sir.

Mr. John M. Martin: That is all.

Mr. Crouch: We will call Mr. Hotchkiss, please. [524]



H. G. HOTCHKISS,

recalled as a witness, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

Mr. Crouch: I wonder if government counsel would be kind enough to slide down one chair while I am examining this witness, so I can face the witness.

Mr. Landrum: I will be glad to; yes, sir.

The Court: Mr. Hotchkiss, you were sworn before on another aspect of the case, were you not?

The Witness: Yes; I was, your Honor.

The Court: I apprehend that, the jury having heard Mr. Hotchkiss before as to his qualifications, it won't be necessary to review those unless you desire to enlarge the record unnecessarily.

Mr. Crouch: No, your Honor.

Mr. Landrum: If the court please, the government is perfectly willing to stipulate Mr. Hotchkiss' general qualifications. I do not know, however, what the questions will eventually be. I feel he might need some special qualification if he is going to value an entire shipyard.

By Mr. Crouch:

Q. Mr. Hotchkiss, you were employed by the Concrete Ship Constructors along in October of last year, were you not?            A. Yes, sir. [525]

Q. And I think you told to the jury, and the jury probably remembers most of it, what you did as to your employment, in order that you might testify in this case. When you were on the stand before you were testifying in behalf of the defendant City of National City?

A. Yes, sir.

(Testimony of H. G. Hotchkiss)

Q. They employed you a few days before the trial, did they not?           A. Yes, sir.

Q. And there are some matters in connection with the condemnation of the rights of the Concrete Ship Constructors that the City of National City is not interested in but that we are.           A. Yes.

Q. Were there some further studies or investigations which you made in order to prepare yourself to appraise the value of the leasehold interest of the Concrete Ship Constructors, which you did not tell us about when you were on the stand the other day?

A. Yes, sir; there were some other investigations that I made.

Q. What investigations did you make, with particular reference to the value of the leasehold rights of the Ship Company?

A. Well, I went over, with the officers of the Concrete [526] Ship Company, the contract entered into by them with the Defense Plant Corporation in December, 1941, and familiarized myself with the different sections of that contract and, also, made an inspection of the property and the yard as it is today.

Q. Do you have a copy of the contract before you?

A. Yes, sir.

Q. You will note that the original lease from the City of National City was obtained by the Tavares Construction Company, who assigned the lease to the Defense Plant Corporation at the time of the making of this contract.           A. Yes, sir.

Q. Then, the Defense Plant Corporation assigned it back to the Tavares Construction Company?

A. Yes, sir.

(Testimony of H. G. Hotchkiss)

Q. I want to call your attention now to one or two things that are in this contract particularly because counsel for the government has referred to them in his questioning of certain other witnesses.

Mr. Landrum: If the court please, the question is objected to or the statement is objected to on the ground it is argumentative.

The Court: It does no harm. It may remain. Overruled.

Q. By Mr. Crouch: Will you turn, Mr. Hotchkiss, and [527] possibly the jury might want to follow me, to paragraph 12 of this contract? A. Yes, sir.

Q. Pretty well up in the commencement of the paragraph it refers to the fact that "The Defense Plant Corporation hereby agrees to sublease the site and to lease the facilities and machinery to be acquired, and does hereby sublease the site and leases the facilities and machinery to be acquired hereunder to lessee—" Who is the lessee?

A. The Concrete Ship.

Q. —"for a term ending December 31, 1947, which term, upon its expiration, shall be automatically extended for an additional period ending December 31, 1949."

What do you understand the word "automatically" to mean there?

A. I understand that that means that the lease is extended until 1949, without further negotiations, on the same terms and conditions.

Q. Then I read you this language, "This lease or any extension thereof under this paragraph 12 may be terminated by the parties hereto in the manner hereinafter

(Testimony of H. G. Hotchkiss)

set forth.” Do you in your business frequently have occasions where either party can terminate a lease?

A. It is rather unusual.

Q. Yes. Usually in leases who only can do the ter-  
[528] minating?

A. Usually the lessor, if there is a violation of the terms of the lease.

Q. And in this case the lessor was the Defense Plant Corporation or the United States Government?

A. That is right.

Q. So that is it your view that this was a rather unusual lease?

A. That is an unusual clause; yes, sir.

Q. As a real estate expert, can you imagine why such a clause would be contained in this particular lease?

Mr. Landrum: If your Honor please, we object to the form of the question.

The Court: Yes; I think so. We have great respect for the witness but I don't think his imagination will help us any.

Q. By Mr. Crouch: Then, after the language that I read you, that this lease or any extension thereof under this paragraph 12 may be terminated by the parties hereto in the manner hereinafter set forth, the lease proceeds to provide for the manner in which it may be terminated, doesn't it?

A. Yes, sir.

Q. And does it provide a criterion or prescribe a set of conditions under which the Tavares Construction Company could have terminated it at any time? [529]

A. Yes, sir.



(Testimony of H. G. Hotchkiss)

Q. If so, when?

A. They could terminate it at any time by giving a certain notice.

Q. That is, any time when the site was no longer needed by the government for the construction of boats? Is that not true?

A. Or a substantial portion of the site.

Q. At any time when substantial use by lessee, that is, the Ship Company, of the site, facilities and machinery, shall be no longer required to enable lessee, the Ship Company, to construct boats for the government, the Defense Plant Corporation can terminate it, can't it?

A. Yes, sir.

Q. Now, let's see when the Ship Company can terminate it. "The Defense Plant Corporation may, with the written approval of the Maritime Commission, give written notice to lessee that substantial use is no longer required and that Defense Plant Corporation, therefore, proposes the termination of the lease or extension; and the lessee—" that is, the Ship Company—"may give similar written notice to Defense Corporation and to the Maritime Commission stating that lessee, therefore, proposes the termination of this lease or an extension thereof"? A. Yes, sir. [530]

Q. Will you turn over to paragraph 15? Tell the jury, in ordinary non-legal language, what the paragraph means.

A. This paragraph provides that, upon the expiration or termination of this lease or any extension thereof, according to paragraph 12, it is cancelled and that the lessee has 90 days after the termination or cancellation, the option and the right to purchase all, and the language says,

(Testimony of H. G. Hotchkiss)

“but not part of the site and facilities,” under certain terms and conditions. It also provides that they have the right to negotiate after the formula set out for a part of the site.

Q. I understood—and perhaps you were in court this morning—

A. Yes, sir.

Q. —when counsel for the government was cross examining a witness, that he got from the witness an admission that, on December 23, 1944, which was the date of condemnation, they didn't need the plant any more for the construction of government ships; that they had them about all constructed except two.

A. Under the present contract.

Q. Then, if that were so, the day before this condemnation case was filed, the Tavares Construction Company could have bought the plant and site, couldn't they?

A. They could have under that clause; yes, sir.

Q. You understand that when a city or the State or an [531] irrigation district or even the United States government wants to take anything from anybody, they have got to pay what it is worth, don't they?

A. That is my understanding; yes, sir.

Q. In fact, that is a constitutional guarantee of rights in this land of ours, isn't it?

A. Yes, sir.

Q. And you have been placed on the stand by us to tell this jury your opinion of what the rights were worth that the government is taking away from the Concrete Ship plant. Have you tried to figure it out?

A. Yes, sir.

Q. What in your opinion is the fair and reasonable market value of the leasehold rights of this shipyard plant, machinery, tools and equipment, on the 23rd day of

(Testimony of H. G. Hotchkiss)

December, 1944, at the time the government took them away from them?

Mr. Landrum: If your Honor please, may I have the same general objection that I made to that question as to the other witnesses, on value?

The Court: You are not including in the objection the fact that the witness has not had placed before him a true definition of market value?

Mr. Landrum: No; I am not raising that point, your Honor.

The Court: The same ruling is made. [532]

Mr. Landrum: And may the record show an exception, your Honor?

The Court: So ordered.

The Witness: Do you mean the lease contract, Mr. Crouch?

Q. By Mr. Crouch: The leasehold rights.

A. \$600,000.

Q. Now, tell the jury the reasons why you think that those rights were worth \$600,000 as to all of them.

A. I took into consideration the facts that we have been discussing here. I took into consideration that this contract that was entered into by the Defense Plant Corporation with this Concrete Ship carried several rights with it, the right to build ships for the government during the war and the right, as we have been discussing it, that, in the event the contract was cancelled by either party, the Concrete Ship would have the right to purchase it under certain terms and conditions, not only the land that was in this contract originally but also the land that was taken under this condemnation proceeding. And I took into consideration that the Concrete Ship, in exer-

(Testimony of H. G. Hotchkiss)

cising some of its rights thereunder, would have the right to own in fee simple, if an option was exercised in the contract, a piece of property that bordered on the Bay of San Diego, on the tidelands of National City, which would be a right that no other individual [533] could have or has had in this community or on this Coast that I have been able to find. I took into consideration the fact that, if this option was exercised, this property would have great advantage over other similar properties on tidelands, inasmuch as it could be hypothecated for financing additional improvements. And I also took into consideration that paragraph 15 of the contract gave the Concrete Ship the right, in the event their 90-day period expired and they did not purchase the property in the 90-day period, they had the right to look over the other fellow's shoulder and put in a bid at the same price that anybody else might make, and that was, in my opinion, quite an advantage in the acquisition of this property provided the contract or the option was not exercised. I took into consideration the right that this contract carried with for it free rent after certain conditions were complied with. I also took into consideration the very increased cost of material and equipment from the time this contract was signed until the condemnation proceedings were filed in December of 1944. I took into consideration the further rapid growth of this community from 1942 until 1944. I took into consideration that great increase in population and the transition of this community, National City, together with San Diego and Chula Vista, from a small town to quite a large city. Those are, Mr. Crouch, some of the conditions that I took into consideration in placing that [534] value on the lease contract.



(Testimony of H. G. Hotchkiss)

Q. As an appraiser, I want you to give thought to this question— A. Pardon me?

Q. As an appraiser, I want you to give a little thought to this question. Something was said this morning by counsel for the government about having no right to take into consideration anything that occurs in the future. Is it not a fact that all values of every nature are entirely predicated on what may happen in the future?

Mr. Landrum: If the court please, I agree with counsel in his statement, but I want to object to it, first, upon the ground it is a pure statement of fact; second, that it is argumentative and it doesn't go to the ruling of the court, as a matter of law, on that question at all.

Mr. Crouch: If you agree with me, I take it you won't in your argument to the jury talk about the future any more.

Q. In other words, if there were no tomorrow, this court house wouldn't be worth 10 cents, would it?

A. I agree to that, Mr. Crouch.

Q. There is another thing I want to ask you if you took into consideration. I notice that the legislature of California, in 1917, made the first grant to the City of National City of the tidelands, of which this site is a part, and it recites a number of whereases. "Whereas, since the ad-[535] mission of California into the Union, all tidelands along the navigable waters of this State and all lands lying beneath the navigable waters of the State have been and now are held in trust by the State for the benefit of all of the inhabitants thereof, for the purpose of navigation, commerce and fisheries.

"And whereas—"

Mr. Landrum: If the court please, I don't like to interrupt but I don't understand the question of counsel here. They say that the fee title had been passed. I don't see where the materiality is.

The Court: I don't know what counsel has in mind or what he is leading up to.

Mr. Crouch: It is pretty hard for anybody to get what you have in your mind by the preamble. I don't mind telling the court what this leads up to.

The Court: Let's have it, Mr. Crouch.

Mr. Crouch: The court, however, might consider that my answer would not under the circumstances be a proper thing for the jury to hear at this time, and I don't want to digress and infringe on the courtesy that the court has extended to me.

The Court: There is a later act than that, is there not?

Mr. Landrum: Yes.

Mr. Crouch: The later acts carried forward some of the [536] provisions that were in the prior acts; for instance, the last act of 1925 only amends certain sections, leaving certain other sections of the 1923 act which are still the law.

The Court: I didn't think there was any question here but what the fee title vested in the City of National City.

Mr. Crouch: Not in the slightest.

The Court: What other question is there involved in our case?

Mr. Crouch: There are fee titles, as the Supreme Court said in the Long Beach case—

The Court: Maybe I had better give the jury a recess now and hear what counsel has to say about it. Ladies and gentlemen, we will take a recess for a few minutes. Remember the admonition that I have heretofore

given you and keep it inviolate. Please occupy the jury room.

(The jury thereupon retired from the court room and the following proceedings were had outside the hearing and the presence of the jury.) [537]

Mr. Crouch: I will try to keep my voice up, your Honor.

The Court: Yes. I can hear you, Mr. Crouch. When the room is filled, it seems the acoustics are affected a little bit.

Mr. Crouch: There is no question but what the State of California held the fee title to these tidelands before the conveyance to the City of National City, nor is there any question that under the Act of 1917 the City of National City had a fee title. But there are fee titles, and there are fee titles.

Now, in the common acceptance of the words "fee title," as commonly used by real estate people and laymen, they mean the highest possible title under which a man may own real property. As pointed out in the Long Beach case very clearly, all you need to convey fee title is to have a grant of real property, but there may be a grant of real property and there may be a fee title to real property conveyed, but it may be conveyed under all sorts of restrictions that it is possible for the human mind to imagine. A trustee gets a fee title. A fee title may be conveyed subject to an outstanding lease for 99 years. A fee title may be conveyed with all sorts of reservations as to its use. A fee title might be conveyed to a residential block in Harlem, New York, which would provide that the property could only be inhabited by whites, in which event it would not have any [538] salable value

at all, because no white would live in the neighborhood. A fee title is conveyed, provided it can be isolated or sold as such to somebody, with certain peculiar qualifications that are pleasant to the grantor of the conveyance, and a fee title can be conveyed under a reservation which provides, as this National City reservation provides, that the grantee can never sell it himself.

Now, that is enough to show that there are all sorts of fee titles, with all sorts of values. An unrestricted fee title is the highest possible title that any person may hold real property under, where there are no easements, where there are no restrictions, and where there are no covenants against reconveyance. But when you come to consider the question of the value of a piece of real estate in fee title, subject to restrictions, you have to know what those restrictions are before you can value it, because the restrictions raise or lower the market, limit the demand to that particular class of the public which can make the particular use specified in the restriction.

So I want to show by this witness that he took into consideration the fact that if the tidelands were held by the City of National City under an Act which specifically provided that the City could never dispose of them, and provided that the City could only lease them for a limited number of years, and could cancel the leases, but that when [539] the government of the United States acquires that property, as they are doing in this law suit, and have made the State of California a defendant, and the State of California has conceded its rights and passed out of the picture, that so far as the State of California or the constitutional amendment we are talking about is concerned, it is out, and that if this property were to be acquired under this lease by the Tavares Construction Company, all of the reservations and restrictions that are



contained in the grant through the State are wiped out, and the Tavares Constructions Company holds this title in an unrestricted fee, where it can sell it, lease it, encumber it, and possibly do anything in the world with it, subject only to the unascertained and undecided question of whether or not at the time of the admission of California into the Union the Pueblos did not retain the ancient Spanish right to have the quarters within a pueblo devoted to commerce, navigation or fishery. So I want to show by this witness that in making his valuation he took those things into consideration.

The Court: I suppose he would testify as to what he took into consideration. However, we must have a standard that is applicable, and that is applicable in all condemnation cases. We can't have a variant that would apply in one proceeding in eminent domain, and not apply in others. There are certain features to this case which we have discussed at [540] the bench. You have not been present, I think, in all of those discussions, Mr. Crouch, but there are certain features that might constitute a detriment. I am not saying they do, or they do not, because this is not the forum in which to discuss those matters. The law has fixed a dead-line for the trial of this case, and the jury's function is going to be confined within that dead-line. That is the only way in which it can be safely tried, and it is the only way in which the rights of the litigants may not be prejudiced in this case. There may be remedies which some of the litigants desire to pursue further, after this case, and we desire, so far as we can possibly do so, and we have had the co-operation of counsel and I think all counsel have co-operated in trying to keep the case within that landmark, to chart the course of this case as a condemnation case, in which the government is seeking to acquire the res. The res is fixed,

its status is fixed so far as the government of the United States is concerned on a certain date. Anything that goes to fix the value of the leasehold that was taken at that time by the government is a proper subject-matter of inquiry, and in the ascertainment of that prospective situations that are reasonably certain, not purely imaginary or speculative or suppositious, and not the salesman's talk as to the future, not the Chamber of Commerce pronouncement or the real estate agent's picture, but the actualities that are reasonably [541] susceptible of accomplishment are proper. You may go to that extent in a case of this kind, but that is the limit. We cannot go into purely imaginative aspects. We haven't the power of divination and are not possessed of any occult powers that can discern. We simply must employ our finite faculties. That is all the jury can do and that is all citizens can do. The witnesses have to subject themselves to cross examination, of course. But the status of this property is fixed as of that time and there cannot be any uncertainty about that. If any damage or detriment may have ensued afterwards, this is not the place to litigate such matters. There is a court that is open to the litigants for the settlement of those questions. That is not a condemnation suit.

Have I given you the court's view?

Mr. Crouch: I agree with every word of the court's clear statement and subscribe to it fully. But that still does not eliminate, in my humble opinion, this fact. I am not attempting to show by this witness what will happen to this property after the condemnation. I am asking this witness to value this leasehold as it existed just before the condemnation suit was filed, with the rights contained in the leasehold, and among those rights, set forth and contained in the leasehold, was the right to purchase.

(Testimony of H. G. Hotchkiss)

Then if that is true, why is it not proper for this [542] witness or us to tell the court and the jury what he got, whether or not if the option was to be exercised pursuant to the lease, he would get a higher title than the City of National City had.

The Court: Of course, there is one thing that none of them could get, and that is the right of the people to the fisheries. It does not exist in the government at all. It is a right which the people have. I do not think we will discuss it academically any further, because I think it is clear as to what rights are concerned. You can propound your question, and if the government desires to object to it, we can rule on it. But there are certain rights that even the sovereign does not get in this country. They belong to the people and not to the government.

We will take a recess at this time.

(A short recess was taken.)

(Thereupon the proceedings were resumed within the presence and hearing of the jury:)

The Court: All present. Proceed.

Q. By Mr. Crouch: In arriving, Mr. Hotchkiss, at your figure of—I can't remember it, and I don't know how we can then expect the jury to,—how much was it?

A. 600,000.

Q. 600,000? A. Yes. [543]

Q. —did you take into consideration the fact that should the Tavares Construction Company acquire the plant pursuant to the leasehold, that it would acquire a fee title in the site? A. Yes, sir.

(Testimony of H. G. Hotchkiss)

Q. Will you refer, Mr. Hotchkiss, to the latter part of paragraph 15 of the lease contract?

A. Yes, sir, I have it.

Q. From your knowledge as a real estate expert, tell the jury in simple language what the government agrees to in that paragraph with regard to selling it.

A. Well, they give the lessee here a right to purchase under certain conditions. A condition was that after cancellation they had 90 days to buy it on this formula that was set out, together with the land, at what the land cost the government. If they didn't exercise their right to purchase, they had a further right to make any bid and purchase the property, providing the government put it up for sale and some other bidder made a bid, they had a right to come in and make that same bid and take the property. In other words, they could look at everybody's bid and purchase on those terms.

The Court: In other words, there would be no competition?

The Witness: No competition. [544]

The Court: They had a preferential right?

The Witness: A preferential right, yes, sir.

Q. By Mr. Crouch: Now, I notice that that option right is again referred to in one of the addenda contracts to this original contract. I refer to what is called amendatory No. 6, being an amended agreement made on the 11th of November, 1942, where they add a new paragraph which they numbered 31. Do you find it?

A. Amendatory No. 6?

Q. That is right. Oh, no, it is amendatory No. 5.

A. I thought you said 6. Pardon me.



(Testimony of H. G. Hotchkiss)

Q. I did, but I was in error. It is 5. "By adding thereto the following new paragraph Thirty-one,"—have you found it? A. Yes, sir.

Mr. Crouch: It is the fifth page from the last in the typed copies, so the jurors will understand.

Q. "By adding thereto the following new paragraph Thirty-one:

"Thirty-one: Lessee agrees that when Defense Corporation shall have acquired title to that part of the Site now being condemned by the Government, the Agreement of Lease,"—

then without taking the time to read the next several lines you will note a provision in there that if the Defense Plant Corporation should transfer [545] its rights to another branch of the government, pursuant to paragraph 26 thereof, prior to the acquisition by the Defense Corporation of title to that part of the site now being condemned by the government, lessee, that is, the Ship Company "will, if it should thereafter elect to exercise the option to purchase conferred by paragraph Fifteen of said agreement of lease, as amended, pay to the Government the cost," and so forth, on the same basis as they would if the Defense Plant Corporation had not transferred its rights. Do you understand that?

A. I don't think I followed you, Mr. Crouch.

Q. Well, as I interpret this clause, under paragraph 15 of the original contract it provides that the Defense Plant Corporation might have the right to assign all its interests to another branch of the government, like, we will say, the Navy and then, in order to protect the government they have this provision in this amendatory paragraph No. 5, that in the event the government, the De-

(Testimony of H. G. Hotchkiss)

fense Plant Corporation, should transfer its rights to another branch of the government, and in the event that the Tavares Construction Company should elect to exercise its option to purchase, that they would use the same basis for fixing the costs as had been in the prior agreement specified. Do you get it? A. Yes, sir.

Q. Then in arriving at your valuation, did you take [546] into consideration the fact that these option rights of the Concrete Ship Constructors to buy the land would not be terminated because the Defense Plant Corporation passed out of the picture and some other branch of the government took its place? A. Yes, sir.

Q. Now, you said that you took into consideration in making your evaluation that there would come a time, if this lease were not terminated, when the Ship Company would thereafter have the free use of the plant. That is a fact, is it not?

A. Yes, sir, I took that into consideration.

Q. Now, I call your attention to the last page of the last amendment, "When the total amount of rental—"

A. I haven't found it, Mr. Crouch, as yet.

Q. The last page of the last amendment.

A. That is amendment No. 6?

Q. Yes. That is about the middle of the page. Have you got it? A. How does it start?

Q. Right in the middle of the paragraph, "When the total amount of rental,"— A. I have it.

Q. "—which Lessee shall be required to pay hereunder shall equal the amount expended by Defense Corporation [547] under this agreement (including all direct expenses, without overhead, incurred by Defense Corporation in connection with the Site, Facilities and

(Testimony of H. G. Hotchkiss)

Machinery or in connection with this agreement) plus interest on each expenditure from the date thereof at the rate of Four per cent per annum less an amount equal to interest at Four per cent on each rental payment from the date of payment thereof, Lessee shall not be required to pay further rental."

How did that affect the value of this leasehold?

A. I took that into consideration as an advantage that anyone acquiring this plant would have in bidding on contracts over some other company or plant that might not have those same facilities. In other words, a rent of equipment and plant is a factor of cost, and if this corporation was in a position so that it did not have to consider the rent, and some other plant did, of course, it is obvious that they could make a better bid.

Q. Now, I believe you said that you took into consideration the increase in the prices of machinery, tools and equipment between November 10, 1942 and December 23, 1944, when the plant was taken away from them, a period of two years, one month and thirteen days. Tell the jury,—go into that a little bit more in detail and tell them what you know on that subject of what happened between those dates with reference to the construction industry, the availability [548] of materials and of labor, and the effectiveness of labor, as between those two dates.

A. Well, as an example, in the operation of the property that we operate, we operate office buildings and apartment houses, store buildings, where we are obliged ourselves to buy different kinds of equipment, machinery, compressors, elevator equipment, and things like that, and we found that from 1942 until 1944 things in our line had advanced approximately 20 per cent during that time,

(Testimony of H. G. Hotchkiss)

in the purchase of equipment. Real estate values during that time in some classes of property went up as much as eight and ten times. In other classes of property it doubled. In other classes of property it went up probably three or four times, depending, of course, upon the demand and the scarcity of that particular commodity, and in checking with other contractors—or, I mean contractors and not other contractors—but in checking with contractors the information I received from them was about that same percentage of increase.

Q. You have given us a general statement about the increase in the value of real properties, running all the way, I think you said, from double to ten, or whatever it was, times. What can you tell the jury about the increase in value of this particular type of tideland property between those two dates?

A. I would say that this particular property doubled [549] in value from 1942 until 1944, in December. I think that is conservative, that it doubled in value.

Q. Now, will you tell the jury what those two dates mean, why you pick them out?

Mr. Landrum: If the court please, that is a matter of law for this court.

The Court: The objection is sustained.

Q. By Mr. Crouch: As a matter of fact, Mr. Hotchkiss, from what you know of the conditions of availability of materials and labor in December of 1944, if anyone wanted to buy that concrete ship plant or wanted to buy a ship plant, and they couldn't come to satisfactory terms, could they have built such a plant at all?

A. In my opinion, they could not.



(Testimony of H. G. Hotchkiss)

Q. Well, is it your opinion as an appraiser than when anybody has a very useful thing, and nobody can duplicate it, that it is of greater value than if nobody else could make one like it?

Mr. Landrum: Just a moment. I object to that. It is argumentative, and the question answers itself.

Mr. Crouch: That is all right, then. I will not ask for the answer.

The Court: Apparently it is an obvious matter. You have to give the jury some consideration in using their intellectual processes in discerning obvious matters. [550] I don't believe we need witnesses to tell them that.

Mr. Crouch: In other words, the court thinks that I should assume I don't have to break the glass out of a window before the jury can see out.

Q. By Mr. Crouch: Now, when you were hired, Mr. Hotchkiss, were you given any other instructions by the Concrete Ship Constructors, or their attorneys,—

Mr. Landrum: That is objected to. It is immaterial what instructions they gave him.

The Court: Overruled.

The Witness: As to what?

Mr. Crouch: —than—and I think that will fit in where I left off—to make a very careful, thorough investigation of this plant, site, facilities, and all of the conditions surrounding it, which affected the value of that leasehold, and to appraise that leasehold at such an amount as, in your opinion, was its fair and reasonable worth and would sell for, if it could be sold.

A. Yes, sir, that is what they asked me.

Q. On the 12th day of December, 1923?

A. Yes, sir.

(Testimony of H. G. Hotchkiss)

The Court: You do not mean that date, Mr. Crouch?

Q. By Mr. Crouch: 1944. The 23rd day of December, 1944? A. 1944, yes. [551]

The Court: You got the "23" in the wrong place, I think.

Mr. Crouch: Yes. Now, Mr. Hotchkiss, I will turn you over to the tender mercies of the government's counsel. [552]

### Cross Examination

By Mr. Landrum:

Q. Mr. Hotchkiss, it wouldn't have made much difference to you what they told you? That is what you would have done anyway? A. Yes, sir.

Q. They are not going to tell you what you would do so far as making an appraisal is concerned, are they?

A. No, sir.

Q. Mr. Hotchkiss, I want to ask you whether or not it is your opinion that the shipyard—and that is what you are valuing, isn't it?

A. I am valuing the contract.

Q. But, in order to do that, you have to arrive at a conclusion with relation to the fair market value of this entire yard and all the facilities, don't you?

A. That is one of the factors; yes, sir.

Q. Now, will you be good enough to tell this court and jury whether or not, in your opinion, a completed shipyard, doing business and operating and building concrete ships, would have sold for more money, on December 23, 1944, than that same shipyard would have sold for at the beginning of its operations on November 10, 1942?

A. I believe it would, sir.

(Testimony of H. G. Hotchkiss)

Q. In arriving at this conclusion, did you take into [553] consideration the fact that the Concrete Ship Constructors had practically completed their last contract with the government for the construction of ships?

A. I considered that, Mr. Landrum, and I also considered the fact that we were in war and no one knew exactly how long that war would last, nor did I know how many more contracts might be desired before that war was over.

Q. I just wanted to know if you thought that we were not a good deal more anxious to get these concrete ships and shipyards in 1942 than in January, 1945?

A. I couldn't tell. I didn't know how long that war would last. I was afraid it would last five years or more. It was only my opinion, of course.

Q. Now, what you are valuing here is a completed going shipyard, isn't it?

A. Ready to operate; yes, sir.

Q. Do you know about when all of this building of all these concrete barges actually stopped, dropped and quit?

A. I know practically when these contracts were expiring.

Q. Mr. Hotchkiss, in arriving at your conclusion with relation to the fair market value of this leasehold interest, of course, you had to arrive at that conclusion with relation to the fair market value of the land as separated from the facilities, did you not? [554]

A. That is one of the factors I took into consideration; yes.

Q. And under the contract, which we know here as Defendant's Exhibit W, I believe, Plancor 407, it is provided that the cost which would have to be paid under

(Testimony of H. G. Hotchkiss)

this subdivision (b) of the option clause would depend upon the amount of money that the government of the United States would have to pay for the acquisition of the land?      A. That is correct, sir.

Q. In the figure which you have put in for this land value, you have used your own opinion of that, haven't you?      A. That I had to do; yes, sir.

Q. Of course, if we had this jury's verdict, that would have fixed it for us, wouldn't it?

A. It would have made it much easier for me, sir.

Q. Let me ask you this. You had the exact figures as to what the government had to pay for some of these parcels, didn't you?

A. No; I didn't have that. I heard that they had settled with the Santa Fe but I didn't know what they had settled for.

Q. Parcel 4 must be included in your figures, must it not?      A. Yes, sir.

Q. Parcel 10 must be included in your figures, must it [555] not?      A. Yes, sir.

Q. Parcel 11 must be included in your figures, must it not?

A. Yes, sir; the batch plant. They were all included.

Q. And you have arrived at your figures by virtue of your opinion of what the government would have to pay for it?      A. That is right, sir.

Q. In arriving at your opinion with relation to what the government would have to pay for those lands, you took into consideration the sales, did you?

A. There is no sale of tideland, Mr. Landrum. We had nothing to go by on that. But on 9 and 10 there have been sales.



(Testimony of H. G. Hotchkiss)

Q. Mr. Hotchkiss, we had the pleasure of asking you with relation to some sales here a day or two ago, didn't we?     A. Not me; no, sir.

Q. Didn't you give me a sale up there, wherein you said something about lots 1 to 8 in National City had been sold for a certain amount?

A. No, sir. You asked me if I had the corporation property in mind. Mr. Anewalt testified to it and I went and got it.

Q. Didn't you give from the witness stand the figure [556] at which you understood this land had been sold?

A. No, sir; I did not. Or, if I did, I have forgotten it.

Q. Let me ask you, are you familiar with that parcel of property there on which a sale was made, on the 10th day of March, 1942, by the San Diego, Arizona & Eastern Railway Company, to William Henry Stewart and Peter Bennett?     A. No, sir.

Q. Covering the property that you gave me the description of?

A. Only vaguely. I know that we sold it.

Q. You had it listed in your office?

A. It was sold by one of our salesmen.

Q. In 1942?

A. I believe so but I am not familiar enough with that sale to give you the details.

Q. Are you familiar with that property?

A. Vaguely; yes, sir.

Q. Were you familiar with it in 1944?

A. Yes, sir; I went and looked at it with one of our salesmen in 1944.

(Testimony of H. G. Hotchkiss)

Q. Were there buildings on it?

A. There was a building on it at the time I looked at it.

Q. What kind of buildings? [557]

A. It was a factory type building.

Q. That was a developed property and had a factory and buildings on it?

A. Yes, sir. Later it burned down.

Q. Did you consider that property, with that building on it and everything, or a number of buildings, to be qualified to compare or that it could be compared with this bare land?

A. It couldn't be.

Q. Now, I am going to ask you whether or not in arriving at your conclusion with relation to the fair market value of this property you took into consideration the amounts received as rental for leases of tidelands here in the city of San Diego.

A. I took that into consideration; yes, sir.

Q. All right. Now I want you to follow me on a lease or two here. We had the Harbor Master of the City of San Diego here to testify. Do you know him very well?

A. Yes, sir.

Q. They get out a list or a map of the leases which are made by the City of San Diego on these tidelands, do they not?

A. Yes, sir.

Q. And you had available to you such a map?

A. Yes, sir. [558]

Q. Have you got it now so that, if I give you a number, you can look up a lease?

A. No; I haven't it with me.

(Testimony of H. G. Hotchkiss)

Q. In arriving at your conclusion with relation to the fair market value of this property,—do you have any listings of leases in 1944?

A. Just a minute; I may have. No; I am sorry. I had that with me yesterday but I left it in my office.

Q. I won't proceed further with that at this time. You know, however, do you not, that, in 1944, there were at least a half a dozen or more leases made here by the City of San Diego on tidelands?

A. Yes, sir. Just a minute. In 1944?

Q. Yes, sir. We are talking about a 1944 valuation here.

A. In 1944, there were only six acres available, is the information I received from the Harbor Master.

Q. Have you got any list of leases there at all with you?

A. No. I just had the number of leases available. And, when I testified the other day, that was the number of acres available.

Q. Do you know the price at which those leases were made, in 1944, for the rental to be paid for the first five years of that term? [559]

A. As a part of the consideration of that lease, yes, sir; I know, in money. It started at—

Q. For the first five years—

Mr. Crouch: I don't think counsel should interrupt, if your Honor please.

Mr. Landrum: I am sorry.

Q. Isn't it a fact that on those leases, every one of them, made by the City of San Diego, in the year 1944, the rental for the first five years was one cent?

A. Plus.

(Testimony of H. G. Hotchkiss)

Q. Plus what? A. Plus other considerations.

Q. What other considerations?

A. The City, as I explained to the jury the other day, takes into consideration what a party will do with that land before they will lease it. In other words, you can't lease that land for one cent nor can I lease it for one cent, but, if we have a plant we expect to put there, and we expect to put taxable property on that land that will produce an income for the city and a payroll that will help the city and the merchants in the city, that is all taken into consideration on the start, and then it is a graduated lease on up.

Q. Do you know of any leases made by the City of San Diego on tidelands, in the year 1944, where the original rental at the start of that lease, for the first five-year [560] period, amounted to as much as three cents? A. When Mr. Brennan testified—

Q. I am asking you, sir.

A. I don't remember the exact date but Roscoe Hazzard, of the Hazzard Construction Company, rented a piece of tideland and paid six cents for it.

Q. To begin with?

A. To begin with. And the reason he paid six cents was because he wasn't putting anything on it but some automobiles.

Q. How long ago has that been?

A. It is within the last couple of years. You see, it depends altogether, Mr. Landrum, on what it is going to produce for the City. That was explained to me by the Harbor Master, who explained it to me at a time when I went to him to try to get leases from him. He wants to know what we are going to do with it.



(Testimony of H. G. Hotchkiss)

Q. Then, Mr. Hotchkiss, a comparison of the rental values in the City of San Diego with these rentals paid by these other corporations are not proper for comparison, are they?

A. It is pretty hard to put your finger on the amount of that money because, in one instance, like Consolidated, where they pay \$600,000 taxes, in comparison with Ryan, who pay probably half of it, it is an impossibility to put your finger on what that consideration is. [561]

Q. That is not what we call a free and open deal on the open market? There are other considerations entering into it?

A. It is the same situation with everybody except when they rent a piece of tideland.

Q. Now,—

Mr. Crouch: I object to counsel interrupting the witness before he has finished his answer.

The Court: I don't think he intentionally interrupted.

The Witness: I was through.

Q. By Mr. Landrum: I am concerned with your statement to the effect that under and by virtue of Exhibit W, which is Plancor 407, Concrete Ship Constructors or the Tavares Construction Company would have free rent after a certain period. Did you say that?

A. Yes; the contract provides it.

Q. But they would only have free rent providing they were building ships for the government, wouldn't they?

A. That is what the contract says.

Q. And, if they were going to engage in any private enterprise there, that contract provides they would have to obtain the consent of the Defense Corporation and the Maritime Commission?

A. Yes, sir. I understand they got that.

(Testimony of H. G. Hotchkiss)

Q. You understand they got that? [562]

A. I understand they got that consent at one time.

Q. And you understood they agreed to pay for it, too, didn't you?

A. I am not familiar enough with that detail to say.

Q. If they were on this shipyard, they would have to pay taxes, wouldn't they?

A. On the equipment.

Q. I beg your pardon?

A. On the equipment.

Q. Do you mean if they owned it?

A. No; under that lease.

Q. They would have to pay taxes?

A. On the equipment.

Q. And they would have to pay insurance, wouldn't they?

A. Yes, sir.

Q. And they would have to pay guards to guard the plant, wouldn't they?

A. Yes, sir.

Q. And, if they didn't have any contracts for the construction of ships, would it be a very profitable thing?

A. It would be profitable in making bids for additional contracts for ships.

Q. But suppose the government of the United States didn't see fit to give them any additional contracts, then where would they be? [563]

A. I think, if you can assume that, then the free rent wouldn't be so valuable.

Q. It would be a liability, wouldn't it, rather than an asset?

A. I wouldn't say it was a liability.

Q. In any event, it is true that, on the 23rd day of December, 1944, they only had one contract left and they only had two ships to build under that?

(Testimony of H. G. Hotchkiss)

A. I understand, as long as they had that contract and were not building ships, they could still operate the plant under the free rent, no matter what they did.

Q. Free rent for what?

A. Anything they wanted to do that was allowed by the Maritime Commission.

Q. But that contract provides that they could only use that plant for the construction of ships for the government, doesn't it?

A. Unless they got permission from the Maritime Commission. It doesn't show they had—

Q. I want you to break down your figures for me. You understand what I mean by that, don't you? In other words, let me ask you this. How much money, in your opinion, would the Tavares Construction Company have had to have paid for this shipyard had it exercised its option?

A. Well, I can't tell you that exact amount because I [564] don't know what they would have had to pay for the land.

Q. But can you give us any figure here if you don't assume something they would have to pay for the land?

A. I did assume what I thought the land was worth.

Q. How much would it have cost them?

A. I can't tell you that until I know when they would have exercised their option exactly. If you give those and you tell me the amount they were to pay and when they would exercise that option, that probably could be figured out. But I can't figure it out here now.

Q. Do you mean to say, if you can't tell us when they were going to exercise that option, that you are going to tell us what it was worth?

(Testimony of H. G. Hotchkiss)

A. I am giving the value that I felt that I could sell that contract for to a buyer who was interested in going into the ship business and having a plant ready to operate and ready to go into. In other words, he would have paid \$600,000 for it.

Q. Are you assuming that there is a possibility or a probability that they might have waited to exercise their option?

A. If the contract wasn't cancelled and they had contracts to repair ships and carry on their work, they might have done that.

Q. How much would they have gotten for it then? What [565] bonus could they have gotten if they had waited until 1949 to sell it?

A. In working out that formula, they would have paid that much less for the equipment. They would have paid the amount the formula called for. The longer they waited, the less the equipment would be.

Q. Do you have an opinion as to how much shipyards would sell for in 1949?

Mr. Crouch: That is objected to, your Honor, as not a proper question.

The Court: Overruled.

The Witness: I can't tell what they would have sold for in 1949. It depends altogether on conditions and how much work they might have.

Q. By Mr. Landrum: Mr. Hotchkiss, are you basing your answer in any manner on speculation or conjecture? A. No, sir.

Mr. Landrum: I guess that is all, your Honor.

The Court: We have a little more time. You might call another witness.

Mr. Crouch: We will call Mr. Anewalt.



PHILIP H. ANEWALT,

recalled as a witness, having been previously duly sworn, was examined and testified further as follows:

The Court: Mr. Anewalt, you have been sworn before? [566]

The Witness: Yes, sir.

Direct Examination

By Mr. Crouch:

Q. Mr. Anewalt, you were employed by the Concrete Ship Constructors in October of last year, were you not?

A. No, sir; I was not. I think you have me mixed up with Mr. Hotchkiss. I was employed some time later.

Q. About when was it?

A. About three weeks ago.

Q. What was the nature of your employment?

A. To ascertain the fair market value of the leasehold estate created under a certain contract between the Tavares Construction Company and the United States Government, represented by D. P. C.

Q. And you told us the other day when you were on the stand as a witness for the City of National City what your qualifications were. I will ask counsel if they are willing to stipulate to the qualifications.

Mr. Landrum: I am very happy to stipulate to his general qualifications in so far as they went the other day, your Honor, but I believe he is now going to be asked to value something a lot different, and I believe we should have his qualifications for that purpose.

Mr. Crouch: In the interests of economy of time, will you stipulate that with respect to his qualifications to [567] testify as a witness for the Concrete Ship Constructors the same questions were asked and the same answers were given by him as he testified to when he was a witness for the City of National City?

(Testimony of Philip H. Anewalt)

Mr. Landrum: I will be very glad to so stipulate, your Honor.

The Court: So understood, ladies and gentlemen.

Q. By Mr. Crouch: Now, Mr. Anewalt, will you tell the court and jury just what investigations you made with respect to ascertaining what, in your opinion, would be the fair value of the leasehold estate of the Concrete Ship Constructors in the National City plant?

A. In addition to those investigations that I made and that I testified to in connection with the testimony on National City, I consulted a number of contractors who were doing large work for the government in 1942 and 1944. I checked with material houses and subcontractors and checked OPA ceiling prices to get some idea, a definite idea as well as I could, as to the value or change in value of material and machinery, equipment and buildings, and viewed our own records on construction and purchase in our own office. I believe that the other things that I did for National City cover all of the other aspects.

The Court: I think we will take a recess now until tomorrow morning. Tomorrow morning at 9:30 o'clock, ladies and [568] gentlemen. Remember the admonition heretofore given you and keep its terms inviolate.

Mr. Landrum: Your Honor, I have the requested instructions with me. Shall I leave them here or bring them into your chambers?

The Court: Just leave them with the clerk. And I want the defendants' also.

Mr. Monroe: We will have ours tomorrow morning. We had to rewrite part of them today.

(Thereupon, an adjournment was taken until 9:30 o'clock a. m., Friday, February 21, 1947.) [569]

San Diego, California, Friday, February 21, 1947.

9:30 A. M.

The Court: All present. Proceed.

HENRY PHILLIP ANEWALT,

called as a witness called on behalf of the defendants Tavares Construction Company, et al., having been previously sworn, testified further as follows:

Direct Examination (Continued)

By Mr. Crouch:

Q. Have you, Mr. Anewalt, related all of the things which you did in preparation for arriving at your value of this leasehold, which were not testified to by you when you were on the stand as a witness for the City of National City?

A. I don't believe that I mentioned, Mr. Crouch, that I had made a study of the Tavares D. P. C. contract of December, 1941, which I did. I made a very thorough study of it and also checked the cost statements as to the construction work that was done, and discussed them with the officials of the Tavares Construction Company.

Q. As a result of everything which you did, did you arrive at an opinion of the fair and reasonable market value of the leasehold estate of the Tavares Construction Company, Inc. on the 23rd day of December, 1944?

A. I did.

Q. What, in your opinion, was that market value on [571] that date?

Mr. Landrum: If the court please, that is objected to on the grounds of my general objection, which I have heretofore stated, and if I may have it again without repeating it, your Honor.

(Testimony of Henry Phillip Anewalt)

The Court: Yes, sir. The objection is overruled.

The Witness: I beg your pardon. You asked me what my opinion was as to the value, Mr. Crouch?

Q. By Mr. Crouch: Yes, sir. A. \$500,000.

Q. Now, Mr. Anewalt, I want you to forget that you are on the witness stand as a witness in every respect except that you are under oath. I want you to imagine that you are in the homes of these jurors, and that they asked you the question I am going to ask you, and you answer it as though it was their question, and the question is:

What are the reasons, Mr. Anewalt, for you being of the opinion on that date that the leasehold rights of the Tavares Construction Company, Inc. were worth \$600,000 or more, or, I should say, \$500,000 or more?

Mr. Landrum: That is objected to, if the court please, first upon the ground and for the reason that it calls for an imaginary statement; second, it calls for a situation which cannot possibly exist; third, it calls for the presentation of an argumentative statement to this jury rather than [572] proceeding by question and answer.

The Court: I think it may be stripped of its surplusage, and I presume that the witness would answer the same with the additional solemnity that he is under oath here, although I don't know if he would or not, if he had the privilege of going to the homes of the jurors. I do not think those things are of much materiality. I think Mr. Anewalt knows that he is under oath here, and will give his views accordingly, whether being in the privacy of a home or not. This is in open court. He has a right to state his reasons for his answer. That is really what the



(Testimony of Henry Phillip Anewalt)

question means. As so understood, Mr. Anewalt, the objection is overruled, and you may answer. [573]

A. I took into consideration in arriving at that figure the fact that we were at war in 1944, and particularly around that time I had reason to know that we were in very great need of repair facilities.

We had ships in there, transports, that we were trying to get out in a hurry, and we had often to get the gangs for repairs out of town. Those of us that were there had very little idea when this war was going to be over, and, in 1944, we were not just at all sure as to how much we were going to require. They were very strenuous times and we were carrying the war overseas and we needed ships and we needed ships repaired and we needed them repaired in a hurry, and we were working at night to get them out. I took into consideration the fact of the various elements that were involved in this contract that were quite unique, each one depending upon future circumstances, such as the duration of the war, the conditions of the operation of the plant, that could be worth, in my opinion, the \$500,000. One of the elements under this contract that is unique is the so-called free rent period. That period, as you heard, applies after the amortization of the cost to the government while they are constructing or working on Navy vessels or government vessels. That period could have been a minimum of, we will say, 90 days until the period of termination of the contract, or it could have been until 1949. Nobody could well tell for [574] sure how long that would be. They paid in the equivalent of rental a rate figured out on a monthly basis of around \$90,000 a month. On the minimum basis, it would be \$270,000 at that rate. If, on the

(Testimony of Henry Phillip Anewalt)

other hand, you would apply a different rental schedule there, say as we usually work out in these rentals, an amortization of the improvements plus an interest rate on them and a return on the land, it would probably reflect somewhere in the neighborhood of \$30,000 or \$35,000 a month, which would have been half what they had been paying or less. The very unique position that I feel that they felt they were in was that they had the option not only to buy all but not part of the property when, as and if this contract should be terminated, and they would have the ability to negotiate for part of it if they saw fit. But there is one small thing beyond that that, in its turn, could amount to a sizeable amount of money and that is that, if they should get into any negotiation feature and it should go out to the equivalent of bidding by competitors, all they had to do was to meet the highest bid, and I know that in our business, where bidding takes place and where, in normal circumstances, you have to outbid your competition, when you can sit back and relax and wait to see what your highest competitor is going to bid and then get it for that price, you have got an advantage. The element of the improvement in values or increase in values of the equipment, machinery and buildings, from 1942 to what-[575] ever date might be established as the time that the option might be exercised, in my opinion, the acceleration of depreciation, the increase in depreciation, by the formula, was far greater, which would reflect in the option to purchase, than the physical depreciation and the lack of value in the equipment. In other words, because of the scarcity of commodities and because of the difficulty in getting them and because of increased costs, those things, in my opinion, would more than wipe out the

(Testimony of Henry Phillip Anewalt)

accelerated depreciation factor in the formulas they had, that they would have the opportunity of buying that under. I also believe that the increase in value in that land between 1942 and 1944 was a material matter. There is no question in my mind, from analyzing the trend of sales, that there was a very material increase in the value of the land. The ability to sit there in this, again, very unusual and unique position of owning a parcel of land in San Diego Harbor that no individual has owned and I doubt will again have that same opportunity to own in fee, their own deep water in front of the channel, the ship channel there, where they can make their own equivalent of a little harbor, where they can have facilities of rail and water, up adjacent to within a matter of a block each way of a very big and adequate highway, right in the area where industrial development is growing, and the zoning very favorable—if any of you are familiar with the problems of changing zones in [576] these communities for specialized use, you know it is very difficult to get zone variations when you are dealing in heavy industry—and the peculiar configuration of this community, that is, both National City and Chula Vista and San Diego, that the M-1 and M-2 zone areas, where they can be served by rail and by water are very limited, and when you are served by water, it doesn't mean it is just water in front of it. It means that there is navigable water, because it is a problem and a big expense when you get to dredging a ship's channel, and, though you may find water at depths where it might be equivalent to a channel, you have considerable unevenness, and, when you handle ships there, unless it is very well buoyed, unless you hit it at the right time at high tide, you are liable to go aground and you

(Testimony of Henry Phillip Anewalt)

are not going to get ships through there without difficulty. [577]

I took into consideration the various costs of these elements, and I couldn't make any fixed differentiation on any one of these particular ones because this contract is peculiar, in that unless you know what the government is going to pay on a fixed date for the land, you can't arrive at a fixed value of that land.

As to the value of the improvements, until you determine for a fact the day that you are going to exercise the option, taking that feature of it, why, you can't tell what you are going to have to pay for that because the depreciation keeps on accelerating.

Now, one thing further in the contract that I don't believe has been mentioned to you is that there is a limitation, and, as I understand it, that they have the option of this formula A and formula B, but at no time should it be less than 15 per cent of the amortized cost—I mean of the gross cost. The formula that would be applicable would be the one that is greater for the government, and that is why primarily we are all considering the operation under formula B, because under formula A, to all intents and purposes there would be no value, because they had already amortized under that formula and paid back in rent the amount that the government had expended.

I took into consideration the records that we had that indicated an increase in rental values. I took into [578] consideration the conditions that prevailed on other tidelands, but, in my opinion and from my experience in making leases through there and sales, where competition



(Testimony of Henry Phillip Anewalt)

would be comparable, and after taking those things all into consideration I felt definitely that I could have, knowing these things and knowing what this ship repair and building picture was, could have sold that contract for at least \$500,000.

Q. You say "at least." Do you think you could sell it for more? A. It is quite—

Mr. Landrum: If the court please, I object to the witness giving his opinion. The question is argumentative.

The Court: I don't know if the witness was giving his opinion as to the fair market value or not, in view of that answer.

The Witness: Yes, sir.

The Court: I understood you to say \$500,000.

The Witness: Yes, sir.

The Court: If that is what you mean—

The Witness: That is my opinion, yes, sir.

The Court: All right. There is no more or no less in that figure. That is the figure given as an opinion of the value. Objection sustained.

Q. By Mr. Crouch: Did you take into consideration the fact of the difference in rights that the Tavares Construction Company would have over this land that it would not have had if it had leased them from the City of National City?

Mr. Landrum: If the court please, that is objected to. It is repetition. The witness has already stated his position on that.

The Court: I think that is a leading question. Sustained.

(Testimony of Henry Phillip Anewalt)

Q. By Mr. Crouch: Something was said about there being an immense amount of lands like this farther on down the Coast that were available. Can you answer that statement?

A. Well, do you mean, sir, by on the Coast the coastal shoreline, or do you mean in San Diego Bay?

Q. Well, I mean farther south.

A. In San Diego Bay?

Q. I am not sure that I know exactly what the man that made the statement had in mind, but I took it—

The Court: I don't suppose we are concerned, are we, with the ocean frontage? We are concerned with the Bay frontage, I think, where it runs down around Otay and National City and Chula Vista, in through there.

Mr. Crouch: I think that is correct. I don't think counsel had in mind other than that, but I mean in San Diego Bay farther south.

The Witness: I am familiar with that area, sir. [580]

Q. By Mr. Crouch: I beg your pardon?

A. I am familiar with that area.

Q. Well, what do you know about it?

A. Well, it is shallow water, more or less, from this parcel down, as far as channel water is concerned, and there are quite varying depths the farther south you go. It shoals out very rapidly, and there are extensive, what we call mud flats down by Paradise Cove and down—and I am talking now of 1942 and '44—off the Sweetwater, and down by Chula Vista. I happen to have sold the fee lands to the Santa Fe Railroad that cover practically all that area, practically adjoining inside of the tidelands and except for a little channel where the old Hercules powder plant was, it is pretty shallow water as a whole. And

(Testimony of Henry Phillip Anewalt)

farther south you get down to where they had the salt works. Of course, they have used the tidelands to advantage there, but it isn't used in connection with shipping or getting the maximum use from a general or utility use of it. I don't know of any other lands down there that I could say in any way were comparable with these, so far as their ready utility is concerned.

Mr. Crouch: Do I understand, Mr. Landrum, that all of the statements which the witness made when he was on the stand for National City or deemed to be available for the Tavares Construction Company, without repeating it on the [581] part of the witness?

Mr. Landrum: We are perfectly willing to stipulate, your Honor, that any testimony this witness or any other witness has given in this case may be used and taken by the jury and taken into consideration not only for the claim of National City but for the Tavares Construction Company.

The Court: So understood.

Mr. Crouch: Thank you. You may cross-examine.

#### Cross-Examination

By Mr. Landrum:

Q. Mr. Anewalt, when did you first begin your preparation and study that you made to qualify yourself to give an opinion with relation to the fair market value of this property?

A. Intensely I would say about two weeks ago. Generally some time before that when my partner was interested in it.

Q. Prior to the time that you reached your conclusion with relation to what your testimony might be here,

(Testimony of Henry Phillip Anewalt)

do I understand you to say that you had made a very thorough study of the terms of the exhibit which is in this case, known as Exhibit W or Plancor 407?

A. Yes, sir.

Q. Now, there are just a few matters that I think I would like to explore with you. I take it that you consulted [582] very thoroughly with the officials of the Tavares Construction Company, and that they made available to you all of the information which they had and all of the files which they had, did they not?

A. In so far as I know, they did, yes, sir.

Mr. Landrum: May I have the two letters?

(The documents were handed to counsel.)

Q. By Mr. Landrum: I will ask you, Mr. Anewalt, if they made available to you, sir, and you had an opportunity to know that they had written the two letters which are in evidence in this case as Plaintiff's Exhibit 2 and Plaintiff's Exhibit 3? Did you know of them, or, isn't it a fact that you never learned of them until you came into this court room?

A. I haven't read them yet, sir, if you will give me a chance.

Q. All right.

A. I had not seen these letters. I was informed that an offer had been made, and its general—the general circumstances surrounding it.

Q. You have answered the question, please, sir. You never knew that they had written two letters like this, did you?

A. I understood they had written one. I did not know.



(Testimony of Henry Phillip Anewalt)

Q. Now, I want to ask you this question: did you [583] obtain from them, or did you know the number of man-hours, direct man-hours that they had used on these facilities in the year 1942 in the repair or in work for private individuals at this shipyard, not government contracts at all?

A. No, I did not obtain the actual man-hours. I believe it was discussed. I think there was one particular repair job that they made that was discussed, but so far as literally having known of those man-hours and analyzing them, I didn't do that, sir. They would have been available, I am sure, but I didn't get them.

Q. Now, did they disclose to you the number of direct man-hours that they had used these facilities in the year of 1943 in private enterprise, for which they paid rental to the government of the United States?

A. They did not—I did not obtain the actual man-hours in 1943 that they used in private construction. I understood they had done some, however.

Q. Yes. Now, did they disclose to you the actual number of man-hours that they had used these facilities which were bought and paid for by the government of the United States in private enterprise in the year 1944, prior to December 23rd?

A. The same answer applies, sir. I didn't ask for those figures and I did not study them.

Q. In arriving at your conclusion as to the reasonable [584] and fair market value of this property, do you not feel that it was necessary for you to know what might be required as payment as rental if they maintained this lease, prior to December 23, 1944, and used these facili-

(Testimony of Henry Phillip Anewalt)

ties for anything other than the construction of boats for the government.

A. I ascertained about the value, about the price they would pay in using the facilities for other than government work—

Q. All right.

A. —but I did not go into all of the exact man-hours sir.

Q. Let me ask you, how much rental did they pay to the government of the United States for the use of these facilities up until the 5th day of October, 1944?

A. As I understand it, it was two million—

Q. No, how much they had paid—how much had been deducted from what they got from the ships, as rental?

A. A total of \$2,700,000 some odd. I will get it here in a minute.

Mr. John M. Martin: If the court please, I object to the question as to how much had been deducted from the payment of the ships, because the testimony was that not anything was deducted. Mr. Tavares testified that they were paid in full by the government and that the Concrete Ship Constructors paid it to the Defense Plant Corporation. I think [585] it is contrary to what the question is.

Q. By Mr. Landrum: All right. How much money was it that the Tavares Construction Company paid to the Defense Plant Corporation for rentals during that period?

Mr. John M. Martin: For government work or for private work?

Mr. Landrum: For government work. I propose to show the private work.

(Testimony of Henry Phillip Anewalt)

The Witness: From the figures I have it was \$2,775,-807.01.

Q. By Mr. Landrum: In arriving at your conclusion with relation to the fair market value of this property, did you not have to take into consideration the amount of rent that would be paid on this leasehold interest after December 23rd? In other words, fair market value of leasehold interest, is it not, is the bonus or the amount that would be paid for it, less the rental reserve?

A. That is one of the considerations.

Q. All right. Now, assuming that they would use these facilities in the same proportion that they used them prior to this taking, they having paid \$2,700,000 for approximately three years' use, how much rent would they have had to pay if they had made the use of it for private enterprise? How much a year, assuming it was three years?

A. I didn't figure the number of hours. If you are going on 500 man-hours, how many men are you going to work? [586]

Q. No, I am not doing that, sir. They paid as rental \$2,700,000 for approximately three years; is that correct?

A. That is correct, sir.

Q. All right. Then assuming they did not have any more government contracts and they put this yard to the same use for private enterprise, how much rent would they have had to pay per year on that same basis?

A. How many man-hours are you going to use?

Q. No sir. \$2,700,000 divided by 3 is how much?

A. Oh, that would be—by 3?

Q. Three years. A. Something over \$900,000.

(Testimony of Henry Phillip Anewalt)

Q. Then on that same basis, had they not had any more government contracts and kept the lease and used it for construction of boats not for the government, they would have paid \$900,000 a year rent?

A. They would have paid a little more than that on that basis. Oh, they wouldn't have paid it because they were rent-free. You mean if they were going on the basis of purely outside and no government work?

Q. Well, you are predicating your whole theory on the basis that they were going to have continuous and perpetual operation of this yard with contracts for the government, weren't you?

A. I was predicating it on my knowledge of the [587] necessity, sir, for the Navy work that I was in, needing repairs not forever, but for quite a while. Now, I would have assumed, in my opinion, that when this government work stopped that either the one or the other would have terminated the contract, and by reason of that would have owned the facilities, exercised their option, and had the use of them under their own ownership. [588]

Q. By Mr. Landrum: Well, then, did you include anything or allocate anything in your figure which you have given us, as the fair market value to their leasehold rights alone, for getting the option?

A. Yes. There is nothing allocated to any one thing, sir. If you go on the basis of assuming, we have to assume in each one of these cases, as I understand it, that they are going to continue the government work, then, which has free rent. If they don't continue government work, then they have the option to continue it themselves.

Q. Then, it is your opinion that, once they were engaged in the contracts for the construction of ships for the



(Testimony of Henry Phillip Anewalt)

government of the United States, they wouldn't have kept this yard and wouldn't have kept their lease, would they?

A. It is possible but, also, they could have gone ahead and operated on this formula that I believe they had of so much per hour of labor that they used.

Q. That is what I am getting at.

Mr. Crouch: Pardon me; you are interrupting the witness.

The Witness: On the basis of a repair job it wouldn't have been on the basis of the number of man hours they had been using in the past. You can't establish a basis on that until you know what the picture is going to be. If it was going to be a heavy picture of outside work and practically no government work, then I would assume it would be perfectly [589] reasonable with the government if the Tavares Construction Company would have exercised the option.

Q. Basing it upon the same rental that they had when they were constructing ships for the government, and assuming that they had completed their contract with the government and would have used the entire facilities of this yard as they used them in the construction of boats for the government, it is a fact that, to base it upon that same rental, they would have had to pay a rental of over \$900,000 a year, isn't it?

A. If you want to use that figure but I didn't do that and I don't think it would apply in that way.

Q. Did you inquire of them how much use they had made of this yard for private enterprise in 1942 and the rate of rental which they had to actually pay to the De-

(Testimony of Henry Phillip Anewalt)

fense Plant Corporation for the use of it for that enterprise?

A. I asked them as to the rate of the yard; yes, sir.

Q. And what did they tell you?

A. 10 cents an hour.

Q. 10 cents a manhour?                      A. Yes, sir.

Q. Now, can you tell us, if they used the entire facilities of this yard, assuming they had no more government contracts and they used the entire facilities of this yard in private enterprise, as they did in 1943 in construction of ships for the government,—do you know how much rent [590] that would have figured out at 10 cents per manhour?

A. I could do some figuring. I haven't figured it out, sir. If they were going to get into that type of extensive work, one or the other side would have terminated and they would be there in fee ownership because it says in there, if they are not needed for the repair of government ships, this other phase comes in.

Q. And, therefore, your lease goes out, doesn't it?

A. Yes.

Q. Therefore, you didn't have both the lease and the option, did you?

A. Well, here is the thing—I am sorry—

Q. Go right ahead, sir. With his Honor's permission, you go right ahead.

The Court: He has opened up the inquiry and you may reply to it.

A. The basic principle is this, that they are going to continue and use that for government use, which, in

(Testimony of Henry Phillip Anewalt)

my opinion, would have happened because I am experienced in the Navy, knowing what we needed and how badly we needed it. So I figure very definitely on the basis that there would be a period of probably a year—I couldn't tell you exactly and couldn't tell in 1944 particularly just how long that would be, but I think that reasonable inquiries would have shown the necessity for that kind of work for the War Shipping Adminis-[591] tration and for other interests, the Army Transport crowd, who had no facilities here at that time for repair work—we had to look out for them—and it was my opinion they would continue for at least a year operating for the government's benefit, and under those circumstances they would have had this so-called free rent.

Q. Mr. Anewalt, in our lives the best way to judge the future is by the past, isn't it?

A. It is an indication of it but I wouldn't say it is always the best.

Q. Don't you think that it is better than to project yourself over into the future? Isn't it safer to know what is happening than to try to determine what is going to happen?

A. On that basis, in the last war, and I am talking about the 1917 one, what we were up against there when I came out of that and went into the steamship business—that is one of the things to base it on because then we needed these selfsame things.

(Testimony of Henry Phillip Anewalt)

Q. Both of us who were in that war know what happened, don't we?      A. We do.

Q. When you made your inquiry in order to come before this jury and give your opinion with relation to the fair market value of this property, did you know of or did they [592] give you or did you know of the existence of that instrument which I have just handed you?

Mr. John M. Martin: Pardon me. Has that been received in evidence?

Mr. Landrum: No, sir.

The Court: Show it to counsel.

Mr. Landrum: Here is a copy.

The Court: Is that in evidence now?

Mr. Landrum: No; it hasn't been offered.

The Court: Then, it had better be marked for identification.

The Clerk: Plaintiff's Exhibit No. 4 for identification.

(The document referred to was marked as Plaintiff's Exhibit No. 4 for identification.)

Mr. John M. Martin: I have no objection to the letter being received in evidence.

Mr. Landrum: We will be very happy to have it go in, your Honor.

The Court: It may be received and marked Plaintiff's Exhibit No. 4. While it is fresh in the minds of the jury, you had better read it to them.

Mr. Landrum: Yes, your Honor. Ladies and gentlemen, I now read to you Plaintiff's Exhibit No. 4. [593]



“CONCRETE SHIP CONSTRUCTORS

“National City, California

“Post Office Box D

Phone Greeley 7-4163

“December 12, 1944

“Mr. Byron Howells

“Defense Plant Corporation

“316 Pacific Mutual Building

“Los Angeles, California

“Dear Mr. Howells:

“In furtherance of the enclosed, and in response to your telephone call of even date, this Company has entered into Master Repair Contracts with both the U. S. Army and Navy. The billing rate, as provided for by these contracts, does not include an amount for the rental of the facilities as they are Government-owned. In accordance with the enclosed, we requested permission for the use of these facilities in this connection without charge.

“In addition to this work, we are occasionally called upon to repair vessels other than Government-owned. For the purpose of payment to the Government for the use of these Government-owned facilities, we have, in the past, accrued an amount of 10 cents per direct man hour worked. To date, these accruals have amounted to \$2,806.86. The determination of the 10 cents per hour to be charged was made after reviewing direct man hours consumed in connection with the shipbuilding program.

“The yard was constructed to employ 4,000 workers. During the [594] year 1943, 7,283,000 direct man hours were used in connection with the construction of the concrete vessels. This year represented,

more nearly than any other year, the normal expected employment for the yard if sufficient business was at hand. Facilities cost the Government approximately \$2,750,000, including interest, and this amount depreciated on a fifteen-year basis for the year of 1943 would amount to 0.025 cents per direct man hour worked. With this in mind, 10 cents per direct man hour appeared to be adequate compensation for the use of the facilities for other than Government work.

"The following tabulation sets forth man hours and depreciation per direct man hour, by years, for the years 1942, 1943 and 1944, and the average depreciation for the three-year period:

	<u>"Total Direct Hrs.</u>	<u>15-Year</u>
1942	1,534,000	0.120
1943	7,283,000	0.025
1944 (Estimated)	2,742,000	0.069
Average		0.071

"You will note that this average amount is only 7 cents, well beneath the 10 cents allowed.

"In view of the foregoing, we request that permission be granted to continue the practice of accruing 10 cents per direct man hour worked for repair work other than Government or Governmental agencies, for payment to the Government as [595] rental of facilities.

"Very truly yours,

"Concrete Ship Constructors

(signed)

"T. W. Eisenman

"T. W. Eisenman,

"Asst. to Managing Partners

"TWE/mel

"Enclosure" [596]

(Testimony of Henry Phillip Anewalt)

Q. By Mr. Landrum: Did you know of that letter when you arrived at your conclusion?

A. I didn't know of that letter but that would have strengthened my opinion as to the value.

Q. Now, you have made the statement that you based your conclusion upon the fact that the Navy was in great necessity for the repair of ships?

A. I said that that was one of my considerations.

Q. And that whoever had this shipyard would get that work?

A. Yes, sir; if they should get that work.

Q. Well, did they get it?

A. They got some of this work. I know that we tried to get the local yards to use it here. And this rental would make the land worth even more than I was figuring it was worth. They would make a profit on that.

Q. What did it make the lease worth, this lease that you are valuing?

A. I think it made it more valuable.

Q. Assuming that they had used those facilities in the year 1945 to the same extent that they used them in the year 1943, as disclosed by their own letter, how much rent would they have had to pay the government of the United States for the use of it?

A. Using the 1944 figure? [597]

Q. No, sir. He said 1943 was a peak year.

A. Total direct hours—do you mean the 7,000,000 hours?

Q. Yes. Please give us 1943.

Mr. John M. Martin: If the court please, I don't think the question is intelligible. I think it should be framed so that counsel can understand the question.

(Testimony of Henry Phillip Anewalt)

Mr. Landrum: I will frame it again.

Q. Is it not true that they could only use these facilities rent free when they were constructing boats for the government?      A. Yes, sir.

Q. What did you mean when you said repair contracts?

A. Repair contracts on the outside. I am talking about if they used construction work for that purpose.

Q. Assuming that they used this thing in 1945; that they had that lease and they were going to do the same work that they did in 1943, for private individuals. How much would they have had to pay to the government of the United States?

A. Well, I can figure it out. Based on the 1943 figure of 7,000,000 hours, and I am using round figures, the total direct hours of seven million odd hours would be 10 cents on that or \$700,000.

Q. Is it your opinion that a lease for which they had [598] to pay that could be sold for \$700,000?

A. Yes, sir, because that paid \$1,000,000 a year under the other contract, when they were building the boats.

Q. The profit that was made on what?

A. Repairing or building.

Q. Do you mean the profit they made out of the government of the United States in this shipyard?

A. I mean the profit they made in the general operation, like everybody else makes a profit.

Q. In arriving at your conclusion with relation to the reasonable and fair market value of this leasehold, of course, you took it by its four corners and included within your figure the entire instrument?      A. Yes, sir.



(Testimony of Henry Phillip Anewalt)

Q. What does paragraph 5 of that instrument provide? Well, that is wrong. It is paragraph 9.

A. Do you want me to read it, sir?

Q. Yes; I want you to read paragraph 9.

A. "Paragraph 9. No salaries of Lessee's executive officers, no fees of its attorneys, no part of the expense incurred in conducting Lessee's offices and no overhead expenses of any kind shall be included in the cost of leasing the Site or of the Programs, except that direct expenses of Lessee's Officers or employees and fees of attorneys retained or employed by Lessee in connection with the Programs may be so included to the extent approved by Defense Corporation. [599]

Q. In arriving at your conclusion with relation to the reasonable and fair market value of this property, did you know that, notwithstanding the provisions of paragraph 9, the salaries of the executive officers of Concrete Ship Constructors had been paid out of the money that the government put up here?

Mr. John M. Martin: To which we object as assuming a fact not in evidence and contrary to the evidence thus far given. The testimony thus far by Mr. Tavares was that every item was approved by government audit, and counsel is assuming the contrary in his question.

The Court: Oh, no; that wouldn't vitiate the question, as to whether it was audited or not. Overruled.

Q. By Mr. Landrum: Mr. Anewalt—

The Court: Do you want the question answered?

Mr. Landrum: Yes, sir.

The Witness: May I hear it again?

Q. By Mr. Landrum: In arriving at your conclusion with relation to the reasonable and fair market value of

(Testimony of Henry Phillip Anewalt)

this property, did you know that, notwithstanding the provisions of paragraph 9, the salaries of Tavares, Seabrook and other executive officers of the Concrete Ship Constructors had been paid out of the money which the government put up to build this shipyard?

A. I did not know that, sir. And I would like to ex-[600] plain that answer. May I?

The Court: If it needs explanation, you may go ahead.

The Witness: Because I believe that only parts of their salaries were included in there as approved and applied under the contract. He asked me whether I knew—

The Court: He asked you whether you knew it had been paid.

The Witness: Only part have been paid.

The Court: In other words, your answer is that you now know that some portion of the salaries had been paid?

The Witness: Yes, sir; in accordance with this description here.

The Court: Provision 9?

The Witness: Yes, sir.

Q. By Mr. Landrum: In accordance with Section 9?

A. Yes, sir.

Q. I understood you to say you had made a thorough study of this instrument. A. Yes, sir.

Q. Does Section 9 say they can pay the salary of Tavares?

A. Yes, sir; "except that direct expense of lessee's officers or employees—"

Q. Direct expense upon salaries, are they?

Mr. Crouch: Pardon me; I think he ought to let the wit-[601] ness finish.

The Court: Yes; don't interrupt.

(Testimony of Henry Phillip Anewalt)

The Witness: "except that direct expenses of lessee's officers or employees and fees of attorneys retained or employed by lessee in connection with the Programs may be so included to the extent approved by Defense Corporation." Now, when they have approved it, as far as I was concerned in checking those figures, I would assume they were approved and were right. I knew that some of their salaries were in there.

Q. By Mr. Landrum: Did you construe that paragraph 9 to mean that they could pay the salaries of Mr. Tavares and Mr. Seabrook, or any part of them, out of money put up by the government?

A. I would interpret it that way; yes, sir.

Q. Tell us why that is your interpretation.

A. I am not a lawyer, Mr. Landrum, but, as a layman, I would say that would be included.

Q. What does the word "except" mean to a layman?

A. That it is restricted—wait a minute until I get a better synonym. It means withheld or—

Q. Doesn't it, to put in the language of the street, to you and I mean that you can't pay any salaries of the executive officers of the Concrete Ship Constructors or anything except their direct expenses? [602]

A. Direct; yes, sir.

Q. Now, had you known that, notwithstanding the fact that Exhibit W contained that provision, they had paid salaries, would that have affected your opinion?

A. Well, as a matter of fact, Mr. Landrum, in the estimates I made, because I couldn't get down to any fixing of dates for values, in any cost estimating I would have done, I would have taken the direct costs of the labor and material. I wouldn't have recognized these service

(Testimony of Henry Phillip Anewalt)

costs so-called, but I would have taken, what usually works in the field, of around 10 per cent on the job for what it says in here as service costs. That is general overhead expense that should run on one of those jobs, about 9 to 11 per cent. So I say it wouldn't have made any difference to me whether they were in or out because I wasn't using their so-called service costs.

Q. It has been rather difficult, hasn't it, to figure that?

A. It has been a difficult thing to ascertain because there are problems in it.

Q. Do you think that very fact might enter into the mind of a man or the consciousness of a man who was going to buy that contract?

A. Certainly, he would investigate thoroughly.

Q. And he would find out it contained paragraph 9? [603]

A. Oh, yes.

Q. And he would find out they had paid salaries contrary thereto, wouldn't he?

A. If that would be the interpretation; yes, sir.

Q. And then he would know that the government and the Defense Plant Corporation could immediately cancel this contract for that very reason, wouldn't he?

A. He probably would have checked with the Defense Plant Corporation to ascertain whether it could have been.

Q. Now, do you think he would want to buy a lawsuit with the government of the United States?

A. Not if the Defense Plant Corporation would tell them that was approved and was acceptable. There would be no lawsuit involved.



(Testimony of Henry Phillip Anewalt)

Q. What clause do you consider to be the clause by virtue of which the lessee under here gets an option? Which one is it that you talk about as your option clause?

A. I don't quite recall talking about it as that, sir.

Q. You have made a complete study of this instrument, have you not? A. Yes, sir.

Q. There are options in here, in paragraph 15, I believe, that you are referring to. Paragraph 15 provides only two methods or means under which you could ever get an option, doesn't it? [604]

A. I don't quite interpret it that way.

Q. It provides, "Upon the expiration or termination of this lease or extension thereof pursuant to paragraph 12 hereof, or upon cancellation of this lease or extension thereof pursuant to clause (a) of paragraph 14 hereof," he may have an option? A. That is right.

Q. Now, that, then, takes us back to paragraph 12. Calling your attention to that portion of paragraph 12 which begins, in the second paragraph of it, "At any time when substantial use by lessee of the site, facilities, and machinery shall be no longer required to enable lessee to construct boats for the government, Defense Corporation may, with the written approval of the Maritime Commission," it can be cancelled? A. Yes, sir.

Q. That is one of the clauses, is it not, under which they would have their option? A. Yes, sir.

Q. The other one and the only other one is clause (a) of paragraph 14, under which they could get an option. Now, let's go to that. Paragraph (a) 14 says that all, or substantially all, of lessee's contracts with the government at any time outstanding for the construction of con-

(Testimony of Henry Phillip Anewalt)

crete barges and other boats shall be terminated or cancelled prior to completion. Are you following me?

A. Yes, sir.

Q. It is true, is it not, that those two that I have just read to you are the only clauses in this contract under which they could get an option?

A. Those are the two that are provided.

Q. Now, there is another clause and another ground upon which this Exhibit W, Plancor 407, could be cancelled and terminated?

A. Yes, sir.

Q. And that is clause (b) of paragraph 14, is it not?

A. Yes, sir.

Q. Now, your construction of this instrument is that, if it is terminated or if clause (b) takes place, they are not entitled to an option, are they?

A. If they are in default under these other clauses.

Q. No. Suppose they are not in default under those others at all and suppose the government seeks to invoke its rights under clause (b). They wouldn't have an option, would they?

The Court: Clause (b) refers to the priority clause?

Mr. Landrum: Yes, sir, it reading this way, "the government shall request priority for itself or others with respect to the use of the facilities to be provided hereunder, and lessee shall fail or refuse to give such priority." [606]

The Witness: Yes, sir; if they should fail or refuse to give it.

Q. By Mr. Landrum: Now, if the government should request priority for the United States Navy for the use of those facilities, and the entire facilities, these people would have had to give it to them, wouldn't they?

A. For a period of time possibly.

(Testimony of Henry Phillip Anewalt)

Q. What period of time? A. Indeterminable.

Q. Forever, it might be, might it not?

A. I wouldn't quite believe that but it could be maybe.

Q. Well, if they did want to take this thing and say, "We, the United States Navy and Maritime Commission, through the Defense Plant Corporation—Mr. Tavares, the United States Navy has a lot of ships that need repair. So we want to take this over for another branch of the government." They wouldn't have had any option, would they?

A. Not if they had but at that time we were operating, we were very glad to have any help we could get from outside people.

Q. You were in the Navy? A. Yes, sir.

Q. And you knew all about what the Navy was doing?

A. No, sir.

Q. You didn't know that, by virtue of these two instru-[607] ments which came out and were addressed to your Naval District right here—

A. That is right; to Captain Conger, I believe.

Q. Do you know Captain Conger? A. Yes, sir.

Q. What is the date of those letters?

A. This one is November 28, 1944, and the second one is November 21, 1944.

Q. Let me ask you whether or not this buyer, under the conception we have of fair market value, being a buyer who was willing but not compelled to buy, in possession of full information or such information as a reasonably prudent buyer would have,—if he had had those two letters from the Navy of the United States, asking the Tavares Construction Company what they proposed to do, don't you think he would have figured that the

(Testimony of Henry Phillip Anewalt)

Navy was going to take it over and he may not have any option?

A. These letters aren't from the Navy.

Q. Who are they addressed to?

A. They are addressed to the Navy.

Q. I am sorry. I have got the cart before the horse.

Mr. John M. Martin: Those are what exhibits, Mr. Landrum?

Q. By Mr. Landrum: Don't you think that the buyer would have talked to Captain Conger after he saw those letters? [608]

A. Yes, sir.

Q. Do you think he would have paid \$500,000, then?

The Court: I think you ought to give counsel the exhibit numbers he asked for.

Mr. Landrum: Yes, sir; Plaintiff's Exhibits 2 and 3.

Q. Now, Plaintiff's Exhibit 2 starts off, "With reference to our recent telephone conversation, regarding our disposition of the option given us by the Defense Plant Corporation for and in consideration of the construction of the facilities under Plancor 407, please be advised as follows," and it is addressed to the Eleventh Naval District, San Diego, California, attention, Captain Conger. Now, if a buyer had that letter, do you think he wouldn't have said to the seller, "Mr. Seller, the Navy is going to take it and you haven't got any option"?

A. He would have talked to Captain Conger and I didn't know of any reply that Captain Conger made as to whether they were going to take it or not.

Q. What is the date of those letters?

A. I think one was the 21st of November, 1924, and one was the 23rd of November, 1924.



(Testimony of Henry Phillip Anewalt)

Q. And what is the date under which you are testifying to the fair market value?

A. December 23, 1944.

Q. As a matter of fact, within about six weeks of the [609] date of those letters, the Tavares Construction Company option and lease was brought into this condemnation case, wasn't it?

Mr. Crouch: I didn't hear that question. May I have it read?

The Court: Yes, sir.

(Question read by the reporter.)

Mr. Crouch: No objection.

The Witness: Yes.

Mr. Landrum: I guess that is all.

The Court: Is that all, gentlemen?

Mr. Crouch: No, your Honor.

#### Redirect Examination

By Mr. Crouch:

Q. Your attention was called, Mr. Anewalt, to the very small amount of private work which the shipyard did in 1944—

Mr. Landrum: Just a moment. If the court please, I don't know where counsel gets the question. It is objected to upon the ground it is absolutely contrary to the evidence in this case under that exhibit.

The Court: I am not going to say whether it is small or great, but it is characterizing testimony which has not been given on the witness stand. And it is a leading question. I think you should leave out these adjective terms which place emphasis on testimony of witnesses, which is

(Testimony of Henry Phillip Anewalt)

not in the record. If you want to testify, you had better take the stand. Proceed. [610]

Q. By Mr. Crouch: Your attention, Mr. Anewalt, was called to the amount of work which the shipyard did for private individuals. I think it was 1944.

A. Either 1942, '3 or '4.

Q. Can you imagine any reason why that amount was not larger than it was—

Mr. Landrum: That is objected to—

Q. By Mr. Crouch: —during those years? [611]

Mr. Landrum: That is objected to, if the court please, first, upon the ground and for the reason that it is contrary to the actual evidence in this case. I would like to call the court's attention to that exhibit which shows what the situation was.

The Court: I think probably counsel has his years a little confused, that is all. Read the question, Mr. Reporter.

(The question was read.)

The Court: I do not understand the question. Sustained.

Mr. Landrum: Did your Honor sustain the objection?

The Court: I do not understand the question.

Mr. Landrum: I am going to object to the question.

The Court: I have sustained the objection to it. I can't understand the inquiry.

Q. By Mr. Crouch: Your attention was called, Mr. Anewalt, to a letter which is in evidence as Plaintiff's Exhibit No. 4, which is dated December 12, 1944, the letter being one written by the Concrete Ship Constructors

(Testimony of Henry Phillip Anewalt)

to the Defense Plant Corporation, in which the statement is made as follows:

"In addition to this work, we are occasionally called upon to repair vessels other than government-owned. For the purpose of payment to the government for the use of these government-owned [612] facilities, we have, in the past, accrued an amount of 10 cents per direct man-hour worked. To date these accruals have amounted to \$2,806.86."

Can you give any explanation of why during those years this ship plant did such a small amount of non-government work?

A. Well, unless I knew the gross amount of man-hours in ratio, Mr. Crouch, I would have a difficult time to establish any ratio there.

Q. As a matter of fact, during those years this nation was at war, was it not?           A. That's right.

Q. Practically every large industry in the country that had facilities which could manufacture materials of war was prohibited from doing anything except making munitions of war; isn't that true?

Mr. Landrum: If the court please, that is objected to as contrary to the evidence, contrary to their own evidence in this case, and argumentative.

The Court: I do not think it is contrary to any evidence. It contains assumptions which I think are common knowledge. I don't know whether that is something the witness took into consideration in giving his estimate of the market value of the leasehold that was acquired by the government. [613]

(Testimony of Henry Phillip Anewalt)

Mr. Crouch: I think that will answer the question without the witness making any answer.

Q. By Mr. Crouch: Now, Mr. Anewalt, you have considerable familiarity with various kinds of leases, do you not? A. Yes, sir.

Q. This lease you said was unique. One of these unique features of it is, is it not, that after the government had been repaid the cost of these facilities, thereafter the lessee had free rent? Isn't that rather an unusual clause to be contained in a lease?

Mr. Landrum: That is objected to, first, upon the ground and for the reason it is not proper redirect; second, that it is repetition; third, that it is assuming as a fact something which is not true as a matter of law in the construction of that contract.

The Court: I think that is repetition. You explored that pretty thoroughly. In your examination in chief in extenso you went into the reasons for his giving his valuation of \$500,000 as the market value of the leasehold. I think he mentioned that specific feature. The objection is sustained on the ground it is repetition.

Q. By Mr. Crouch: You were questioned by counsel for the government on cross examination. You brought out that during the period of approximately three years the Tavares [614] Construction Company paid to the government of the United States rent for this plant and facilities in the approximate amount of \$2,775,000 over a period of approximately three years, and you were asked by counsel to divide that amount by three in order to get the yearly rate of rental, which would be approximately \$900,000 a year. As a real estate expert familiar with the ordinary run of leases, and where you have a



(Testimony of Henry Phillip Anewalt)

lease which provides that when the lessor has gotten back the entire cost of what he rents, that thereafter the lessee has the free use of it, what do you conclude, if anything?

A. It would be an advantageous lease for the lessee.

Q. Don't you conclude also that the lessor was trying to get his money back as quickly as possible for the entire cost of the thing leased, and that because of the provision that after he had gotten the entire cost of the thing back, that the lessee would have the free use of it from that time on, that maybe the rent was high?

A. Well, under those conditions that you give me, it would be a logical conclusion.

Q. Now, then if you had a lease that ran from 1941 until 1949, a period of eight years, and the lease provided that the total cost of the rental for the eight-year period was \$2,775,000, and provided that when the lessor got back the entire cost of the property leased, thereafter the lessee [615] should have free rent, don't you think it would be more fair to divide that \$2,775,000 by 8 instead of 3, to get the yearly rate throughout the term?

Mr. Landrum: If the court please, I don't like to interrupt, but I certainly object to the question as leading and argumentative.

The Court: Yes, it is argument. It is something that counsel can go into at the conclusion of the case and ask the jury whether that is not a fair statement, but I believe we had better confine ourselves to testimony and not

(Testimony of Henry Phillip Anewalt)

to argument. The objection is sustained. We haven't heard the other side of it yet.

Q. By Mr. Crouch: Now, Mr. Anewalt, there was one letter that counsel for the government called your attention to on cross examination, which you said confirmed your estimate of value. Counsel did not ask you why, and I will ask you what letter and what there is in it that you had in mind when you made that statement.

A. Well, in establishing the capacities to pay, there are two things that are involved in rents. One of them is the rental value on a competitive basis, and another is the capacity to pay. For instance, in percentage leases the capacity of the people to pay might be considered to be greater in extent to what competitive rental or so-called flat rental might be, and if a going plant or concern can and [616] does pay a high rental, as I would say that that might reflect, that it would establish a high rental rate and would establish, in my mind, a future and higher use value and rental value of the property if owned in fee.

The Court: Mr. Crouch, I think if there is going to be more of the redirect, we will take our recess now, and you can conclude after the recess.

Ladies and gentlemen, we will take a recess for a few minutes. Remember the admonition.

(A short recess was taken.)

The Court: All present. Proceed, Mr. Crouch, and I hope that we can make a little better time from now on

(Testimony of Henry Phillip Anewalt)

than we have so far this morning. I believe we have been a little dilatory here.

Mr. Crouch: That is all, Mr. Anewalt. Thank you.

Mr. Landrum: Just one question, if your Honor please, if I may.

Redirect Examination

By Mr. Landrum:

Q. Mr. Anewalt, counsel has asked you questions with relation to the increase or decrease in the actual use of the facilities of this yard, according to the years set forth in this exhibit. Will you tell the court and jury whether or not those facilities were used more in 1944 than they were in 1943, or less? [617]

A. It shows in 1943 7,000,000 man-hours. I haven't read all the letter through, but this is the digest. And it shows in 1944 2,742,000 man-hours.

Q. State whether or not that doesn't indicate that almost two-thirds of the possible use of that yard was not being used in 1944.

A. I couldn't say, sir, unless I knew about the gross man-hours all the way through what ratio this is.

Q. I know, but the man-hours shown there for 1944 are 2,000,000 something?     A. Yes, sir.

Q. And the man-hours shown for 1943 are 7,000,000 something?     A. Yes, sir.

Mr. Landrum: That is all, your Honor, that I have.

(Witness excused.)

ROY F. BLEIFUSS,

called as a witness by and on behalf of the Defendant Concrete Ship Constructors, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you state your name, please?

The Witness: Roy F. Bleifuss.

The Clerk: Will you spell that?

The Witness: B-l-e-i-f-u-s-s. [618]

By Mr. Crouch:

Q. Where do you reside, Mr. Bleifuss?

A. San Diego.

Q. How long have you lived in San Diego?

A. It will be 40 years in June.

Q. What is your occupation or profession?

A. Real estate, insurance, loans, and property management.

Q. How many years have you pursued that profession?

A. I will have been in the business 39 years next September.

Q. Where? A. All in San Diego.

Q. Have you been connected with any other organizations? A. In the real estate business?

Q. Have you been connected with any other person, firm or corporation in the conduct of your business throughout that period? A. Yes, sir.

Q. Who?

A. I started working in September, 1914, with the Park, Grable Investment Company.



(Testimony of Roy F. Bleifuss)

Q. Pick it up from there without questioning, and tell your experience.

A. I worked for that company until 1919 when we formed [619] the firm of Grable, Francisco & Bleifuss. I continued with them until 1932, at which time I went in business for myself.

Q. What is the general character of the real estate business conducted by you?

A. From 1919 to 1932 we did a general real estate business, but specialized in subdivisions.

Q. Have you ever had any experience as an appraiser, and, if so, what?

A. I am constantly appraising properties for loans. I have been called upon to make appraisals in court at different times. The biggest appraisal which I did was the appraising of the Theosophical Institute on Point Loma. We are constantly appraising properties for sale, listings, loans, and so forth.

Mr. Crouch: Counsel, will you admit his general qualifications, to save time?

Mr. Landrum: I will be very happy to, your Honor.

Mr. Crouch: Thank you.

Q. By Mr. Crouch: You were employed by the Tavares Construction Company along in October of this last year?

A. Yes, sir.

Q. For what purpose?

A. For appraising the value of the leasehold of the Tavares Construction Company. [620]

Q. What did you do in that regard?

A. I went over the property, the site, from one corner to the other, examined the records of the company, the cost statements they had furnished us, and made a general

(Testimony of Roy F. Bleifuss)

preparation and study of the whole setup, the leases, agreements, and so forth.

Q. From that investigation, without going into greater detail, did you arrive at an opinion as to the fair and reasonable market value of the leasehold estate of the Tavares Construction Company, Inc., in the properties being condemned in this action, as such value, in your opinion, was on the 23rd day of December, 1944?

A. I did.

Q. What was your opinion as to the amount?

Mr. Landrum: If the court please, may I have the same general objection to that question as I have heretofore had?

The Court: It may be so understood and that the same ruling is made. Overruled.

The Witness: \$573,000.

Q. By Mr. Crouch: Five hundred and what?

A. And seventy-three thousand dollars.

Q. Now, will you tell the jury the reasons that caused you to reach that opinion?

A. I estimated that that would be the amount that a willing buyer would pay to a willing seller in money, after [621] taking in all the considerations, and within a reasonable length of time. If I were buying the property as of that date, I would take into consideration, first, the location of the site as regards the nation as a whole. I would take into consideration the tremendous swing of population from the East to the West Coast. In that connection I read an article in the Saturday Evening—

Mr. Landrum: Just a minute. If the court please, I don't believe some article he may have read in some news-

(Testimony of Roy F. Bleifuss)

paper, or something, is admissible as going to his special qualifications to determine the value of this property.

The Court: No, I think not. We might get into an exploration then as to the basis of that article, which would extend this trial inordinately. I think the court has a right to consider and to take judicial knowledge of the history of the times, that there has been an inordinate exodus of people from the East to the West Coast and that this region here has been the recipient of the greatest number of people. I think that goes without saying, and we will not have to have much evidence on that. I think that is a factor that the jury would have a right to consider when it comes to make up its verdict as to just compensation. So we will have to eliminate any of these articles that the witness has read.

The Witness: I would take into consideration the lease [622] agreement, and all the advantages that that offers to the purchaser, including the right to purchase at a depreciated value, as set up in the formula, and the negotiation rights that the buyer would have during the option period, the value of the free rental clause in the lease, the right to meet in the 90 days following the option period the best offer at an equal figure which had been submitted by any other purchaser with the privilege of taking 30 days to consider such offer.

I would take into consideration the benefits of acquiring the fee title to the property and its unrestricted use. I would consider the shipyard as of 1944, December 23rd, as a shipyard that was efficient, as had been proved by the fact that it had turned out 47 boats for the government with two at that time under construction. I would consider what it would have cost to replace the facilities,

(Testimony of Roy F. Bleifuss)

and in taking that into consideration I would have questioned whether I would have been able to obtain those facilities at that time.

I think we can assume that the government would have given them the necessary priorities, which would have helped a great deal, but after they had bought the facilities, how long would it take to get them here? Freight was tied up. Ship bottoms were being used for other purposes. Then I would have considered whether or not I would have been able to obtain the labor at that time to put these facilities up. [623] We all know that labor was very short. We all know that some of us even had to cut our own lawns, for if we hired a man we would have to pay him \$1.00 an hour, and he would work three hours. I would have considered all of these things, and I would have estimated that at that time the value of this lease agreement was worth that sum of money.

Mr. Crouch: Take the witness.

### Cross Examination

By Mr. Landrum:

Q. Mr. Bleifuss, when did you first begin your studies in order that you might come before us and give us your opinion with relation to the fair market value of the Exhibit W which is in this case?

A. I was employed in October and got down actively to work at it, I would say, about three weeks ago.

Q. When did you first receive a copy, or, when did you first begin your studies of this contract between the Defense Plant Corporation of the United States and Tavares Construction Company?

A. About three weeks ago.



(Testimony of Roy F. Bleifuss)

Q. You made a very thorough study of it?

A. Yes, I did.

Q. And used that in connection with your work to come in and tell us what you thought?

A. Yes, sir. [624]

Q. All right. Now, of course, after you had received your copy of that contract, you went upon the ground and examined it?

A. Yes, sir.

Q. When did you first go actually, physically upon these premises to examine it?

A. Oh, I would say about the second or third day after I received the contract.

Q. All right. Now, could you give us just about a date for that?

A. About the second day of February.

Q. The second day of February, 1947?

A. That is right.

Q. Who was in occupancy of these premises when you went there for the first time to visualize them, so you could see what they were?

Mr. John M. Martin: Objected to as immaterial and not in issue in this case.

The Court: Overruled.

The Witness: The Navy were in possession of practically all of the property, although the Tavares Construction Company were retaining some buildings there for their own use.

Q. By Mr. Landrum: Yes, sir. From that actual visualization of this shipyard, you were able to tell us what, in your opinion, as a bonus would be paid for Exhibit W? [625]

A. No, sir.

(Testimony of Roy F. Bleifuss)

Q. As a matter of fact, there wasn't any of this there for you to see, was there?

A. There was a part of it.

Q. Very little? That is true, isn't it?

A. The four docks were there, and some of the buildings, some of the tracks, the electric conduits.

Q. As a matter of fact, this shipyard had been practically dismantled before you ever saw it; isn't that correct?

A. Most of the buildings had been dismantled and the part of the warehouse that was near the old pier.

Q. Yes. Were these wet docks there then,—

A. Yes, sir.

Q. —all of them. Would you tell us just exactly what was there, when you went there, out of this, if you can?

A. You mean to step up to that (indicating model)?

Q. No, just tell us. I don't want to take much time on it.

A. Well, the wet docks were there. There were some buildings that were used by the Tavares Construction Company. There were the racks there for storing their reinforcing steel, and other miscellaneous facilities were there.

Q. In arriving at your conclusion with relation to the fair market value of these premises, in order that you might [626] deduct what it would cost Tavares and what he could get for it, did you consult with Anewalt and the other gentlemen who have been here?

A. Did I talk the matter over with them?

Q. Yes.           A. Yes, sir.

(Testimony of Roy F. Bleifuss)

Q. Did they tell you what was there, or did you ascertain it for yourself?

A. I ascertained it for myself.

Q. Did you ever see it?

A. No, sir. I saw photographs.

Q. Is it proper appraisal practice to evaluate a shipyard from a photograph of it? A. I think so.

Q. All right. Now, do you know from the reading of Exhibit W, which we sometimes refer to as Plancor 407, what it was that Tavares Construction Company actually started out upon this venture with?

A. Will you repeat that question?

Q. Do you know from your understanding and reading of Exhibit W, which we know in this case as Plancor 407, what it was that the Tavares Construction Company actually started out with here? A. Yes, sir.

Mr. Crouch: That is objected to as not proper cross [627] examination, irrelevant and immaterial.

The Court: Overruled.

Q. By Mr. Landrum: What was it?

A. It was tidelands that had been filled. There was a mole out there with a—

Q. Now, just a moment. I am sure that you misunderstood my question. The question that I put to you was: What was it that Tavares Construction Company actually had when they entered into this agreement, Plancor 407, Exhibit W, with the government of the United States?

Mr. Crouch: I renew the objection, for the same reasons.

The Court: What they had? You mean what they had with respect to this project?

(Testimony of Roy F. Bleifuss)

Mr. Landrum: Yes, sir, and it is in this Exhibit W. He says he has studied it.

The Court: I want to know what you mean. It doesn't make any difference what the Tavares Construction Company had outside of this project.

Mr. Landrum: No, sir, within the project.

The Court: You did not say that.

Mr. Crouch: With the question so amended, I withdraw the objection.

Mr. Landrum: That is what I meant.

Q. By Mr. Landrum: What was it that the Tavares Construction Company actually started out with in the [628] establishment of this project?

A. Shall I answer?

The Court: Yes.

The Witness: They had a lease from the City of National City.

Q. By Mr. Landrum: Did they get it from the City of National City?

A. They got it from the Allied Engineers, I believe.

Q. That is right. Now, how many acres did they have under that lease?

A. 18 acres.

Q. Will you be good enough to examine the instrument with me. You studied it carefully?

A. Yes, sir.

Q. Will you go with me to the first page of this one I have, to the third "Whereas" and tell this jury how many acres were within that lease, according to the terms of the agreement upon which you base your valuation?

A. This gives approximately 6 acres.

Q. That is correct, is it not?

A. Yes, sir.



(Testimony of Roy F. Bleifuss)

Q. The contract says 6 acres and not 18?

A. Approximately 6.

Q. Where was the 6 acres?

A. The 6 acres was a part of the 18. [629]

Q. Where was the 18?

A. The 18 acres was a part of the tidelands.

Q. What part of the tidelands, parcel 1, parcel 7, parcel 9, parcel A, or what?      A. Parcel 1.

Q. All right, sir, parcel 1. Now, did that lease of the 6 acres in parcel 1 continue, or did they enter into some other arrangement by virtue of which they acquired other leases?

A. Other leases were added to from time to time by the government.

Q. By the government?      A. Yes, sir.

Q. So it is your testimony, as I understand it, that Tavares Construction Company had a lease of approximately 6 acres in parcel 1, and thereafter other leases were entered into by the government to acquire additional parcels for this project?      A. Yes, sir.

Q. Did you get that from your study of the exhibit or from the study of the records in your Recorder's Office, or where?

A. I got that from the study of the leases.

Q. Do you have a lease from the City of National City running to the Defense Plant Corporation, dated February 1, [630] 1942?

A. From the City of National City?

(Testimony of Roy F. Bleifuss)

Q. Yes. A. No, sir. [631]

Q. By Mr. Landrum: Yes, sir.

A. No; I don't have it.

Q. As a matter of fact, those leases were taken by Tavares and assigned to the government, weren't they?

A. That is right.

Q. Now, is it proper appraisal practice and did you in arriving at your conclusion with relation to the fair market value of this leasehold interest just take a lump sum or did you start out and figure the different items entering into your final conclusion?

A. I took different items into consideration in arriving at my lump sum.

Q. You had to put down a figure for each item, did you not?

A. I considered each item. I didn't put down a figure.

Q. Didn't you put down a figure?

A. I considered that in my lump sum.

Q. In order to consider it, didn't you put down a figure for it?

A. I put down their approximate relationship as to the value of the whole.

Q. By that do you mean that you did put down a figure?

A. I didn't appraise each favorable feature of the lease agreement but I made an appraisal of the composite as a whole. [632]

(Testimony of Roy F. Bleifuss)

Q. Let me ask you this. Maybe you will get it straight. Did you or did you not in your studies of this matter break it down into its component parts and give a valuation to each of those parts?

A. I considered the value of each of the parts.

Q. Is your answer yes, sir?

A. I considered the value of each of the parts to the whole.

Q. What did you consider as the value of the land exclusive of the facilities?

Mr. Crouch: At what time?

Mr. Landrum: On December 23, 1944.

The Witness: I don't know as I have any figures. I considered the value of the land as a part of the whole price.

Q. By Mr. Landrum: You are familiar with Exhibit W, are you not?

A. Exhibit W is which one, please?

Q. That is the contract that brings us into this court room, Plancor 407. A. Yes, sir.

Q. That exhibit provides that the amount which Mr. Tavares should pay for his option would be, first, the amount of money which the government of the United States would have to pay for the land, does it not? [633]

A. Yes, sir.

Q. How much did you consider that the government of the United States would have to pay for the land?

A. I wouldn't have any idea as to how much they would have to pay for it.

(Testimony of Roy F. Bleifuss)

Q. Then, how did you get an idea on something you didn't know about?

A. I merely accepted the land as of December 23, 1944, what they would have paid for the land.

Q. Will you go with me to amendatory No. 5 of that contract and I want you to tell me if that doesn't provide that, if he exercises this option, he must include within the price that he is to pay the cost of this site to the government?

A. Yes, sir; that is right.

Q. Now, if you could not know the cost of this site, how could you figure the fair market value of the whole?

A. The cost of the site under the condemnation proceedings as of 1942, under the acquisition program as of 1942, would not have any bearing on my valuation of the land as of December 23, 1944. They are two different dates.

Q. Yes, sir, but I again ask you isn't it true that, if Mr. Tavares had exercised this option, that, by the very terms of the option itself, he would have had to pay the cost of this land to the government? [634]

A. Yes, sir.

Q. In arriving at your conclusion with relation to this market value and the cost of the land to the government, did you consider the fact that they would have to acquire it by condemnation?

A. Yes, sir.

Q. And that you and these other gentlemen who have appeared here would testify to?

A. Yes, sir.

Mr. Landrum: That is all.

Mr. Crouch: That is all. I will call Mr. Mueller.



EDWIN A. MUELLER,

recalled as a witness by and on behalf of the defendants Tavares Construction Company, et al., having been previously duly sworn, resumed the stand and testified as follows:

Direct Examination

The Court: You have been sworn in this case already, have you not?

The Witness: Yes, sir; I have, your Honor.

Mr. Crouch: Will you stipulate to Mr. Mueller's general qualifications, Mr. Landrum?

Mr. Landrum: I am very happy to, your Honor.

The Court: So understand, ladies and gentlemen.

Mr. Crouch: Will you stipulate that, if he were asked the same questions as a witness for the Tavares Construction [635] Company, Inc., that he was asked when he was on the stand for the City of National City, he would give the same answers?

Mr. Landrum: I will be glad to so stipulate, your Honor.

Mr. Crouch: Thank you.

The Court: So understand.

Q. By Mr. Crouch: Mr. Mueller, without going into detail or into a lengthy narration of everything that you did, is it true that you were asked by me, in behalf of the Tavares Construction Company, Inc., to prepare yourself to be able to form an opinion as to the fair and reasonable market value of the leasehold estate of the Tavares Construction Company, Inc., on the 23rd of December, 1944, and did you make such an investigation and preparation and reach an opinion? . . . A. Yes.

Q. Will you tell the jury what, in your opinion, that value was on that date?

(Testimony of Edwin A. Mueller)

Mr. Landrum: May I have the same general objection that I have heretofore had with relation to that question, your Honor?

The Court: It is so understood. You are not questioning the fact that the witness hasn't been asked if he knows and has in mind the definition of fair market value?

Mr. Landrum: No, your Honor. [636]

The Court: With that understanding, the objection is overruled.

The Witness: The question is not quite clear, Mr. Crouch.

(Question read by reporter.)

The Witness: I have an opinion of the fair market value of a certain lease, coupled with an option, as between the Tavares Construction Company and the United States Government, and that is, to-wit, the matter to which—

Q. By Mr. Crouch: That is what I intended to have you understand.

A. In my opinion, the value was \$500,000.

Q. Now, I want you to tell the jury the reasons which cause you to arrive at that opinion, and in that respect will you not feel yourself bound to not repeat anything which you have previously said with respect to the value of the lands in the city of National City? In other words, I want you to tell the jury fully, for the record in our case, all the reasons upon which you predicate your estimate of value, even though you may, of necessity, have to repeat a number of things which you have previously testified to when you were on the stand.

A. I have heretofore covered the factors which I took into consideration in arriving at the value of the lands taken under the condemnation proceeding by the government from the [637] City of National City; the fact that

(Testimony of Edwin A. Mueller)

the lands were industrial in character; that they had rail facilities as well as water frontage; the fact that, by 1942, when all of the lands taken from National City, with the exception of Area A, were condemned; the existence of lands for industrial purposes in the San Diego area, having water frontage, had become a minimum; that the impact of the industrial development upon the City of San Diego was not felt fully until 1944. I made an investigation of those factors in trying to determine not only the value of the lands but also their necessity and the possibility of their being put to use. I have statistics here, which I don't think the court would want me to take the time to present, which indicate that San Diego grew more industrially and developed more industrially in the period from 1940 to 1944 than it did in its entire history of 80 years, from the time it was a pueblo until it became a city, and that is the important factor to me going to the question of the necessity of these lands for industrial purposes. San Diego has a minimum of industrial lands touching on the waterfront and my investigation of the records of the Harbor Department indicated that the lands of the City of San Diego had all either been leased or promised or spoken for by 1942, and that, consequently, industry had to go farther south, and the next natural place was National City for the reason that there was a deep water channel dredged to the [638] outer edge of the subject property and the property was available for development. With particular reference to the problem of the Tavares Construction Company, I read and studied and analyzed, to the best of my ability, the contract entered into between the Tavares Construction Company and the Defense Plant Corporation, known in this case as Plancor 407, and I found that certain

(Testimony of Edwin A. Mueller)

agreements had been reached there. First of all, Plancor 407 states that the lessee has leased, or proposes to lease, and, when I say lessee, I now refer to the Tavares Construction Company. I may have referred to the lessee as the Concrete Ship Constructors but they are interchangeable; they are partners. In this case the lessee has leased, or proposes to lease, a site at National City, California, consisting of approximately 6 acres of land suitable for the location of such additional facilities, hereinafter called the site, and whereas, and so forth. What I just read is a quotation from the top of page 2 of the agreement or lease known as Plancor No. 407, made and entered into on the 27th day of December, 1941. Now, the lease which is referred to there was entered into on the first day of January, 1942, subsequent to the signing of Plancor No. 407 or the making of this agreement. So, consequently, it is fair to assume that they didn't know how much acreage was involved. And that is further emphasized by the fact that the lease which was actually transferred to the Defense Plant Corpora- [639] tion comprised 18 acres, not six acres. And it is the subject of this lease and its ramifications that we are concerned with here and which I took into consideration. I made a study, to the best of my ability, and analyzed this lease and found that it provided a number of things.

The Court: We will continue with your testimony at 2:00 o'clock this afternoon.

Ladies and gentlemen, we will take a recess until 2:00 o'clock this afternoon. Remember the admonition heretofore given you.

(Thereupon, a recess was taken until 2:00 o'clock p. m.) [640]



San Diego, California, Friday, February 21, 1947.  
2:00 P. M.

The Court:   All present.   Proceed.

EDWIN A. MUELLER,

called as a witness on behalf of the Defendant Concrete Ship Constructors, having been previously sworn, resumed the stand and testified further as follows:

Direct Examination (Continued)

By Mr. Crouch:

Q.   Continue with your reasons.

A.   Does the reporter have my last statement, please?

(The portion of the record referred to was read.)

A.   It provided at the beginning that the Tavares Construction Company, as I have already stated, had or was about to secure a lease from the City of National City covering a parcel of land, and that the Tavares Construction Company agreed to assign this lease to the Defense Plant Corporation, and to build a shipyard for the Defense Plant Corporation. It provided that certain sums of money should be furnished by the Defense Plant Corporation for the purpose of building this shipyard. I think the original amount was \$404,500, and that this sum of money should be returned to the government in the form of rent, or so-called rent, upon the completion of each ship. Originally the rent on the first group of ships was a comparatively modest sum, because [641] it was apparent that it didn't require so much money to amortize the \$400,000 as it did to amortize the larger sum which was used later on. By various amendments, I believe there were six in all, as the Concrete Ship Constructors developed their business, and as the need for

(Testimony of Edwin A. Mueller)

more ships, ship production, became apparent, the government advanced more money to the Concrete Ship Constructors, and in each case then they required a larger payment upon the completion of each ship, so that as they reached each stage of advancement the amount of the payment upon the completion of each ship was sufficient to amortize or pay off the whole sum advanced.

That was the first agreement, as far as advancing money is concerned, and as far as the repayment of money was concerned. The ultimate amount advanced was something in excess of \$2,700,000.

Just skipping briefly through the lease, as a part of his duties Mr. Tavares agreed to prepare and submit plans for the construction of facilities and to construct them when they were approved by the Defense Plant Corporation. Mr. Tavares had the right to employ subcontractors and to enter into contracts, with the approval of the Defense Plant Corporation. The Defense Plant Corporation was to pay all costs of the construction, as the work progressed and when they approved it. Mr. Tavares, or the Concrete Ship [642] Constructors, had the right to purchase items of machinery, provided the Defense Plant Corporation didn't object in writing within three days after they were notified that they proposed to purchase the machinery. [643]

The Concrete Ship Constructors agreed to submit all bills for machinery to the Defense Plant Corporation and that they were to be certified by them. They were to mark each item of machinery or each facility, in so far as possible, to show that it was owned by the Defense Plant Corporation. And then the usual agreements, that the Concrete Ship Constructors would abide by all federal

(Testimony of Edwin A. Mueller)

laws and not discriminate against any worker because of race or religion and so forth; that the title of the facilities and Mr. Tavares' interest in the lease should vest in the Defense Plant Corporation, or those to whom it assigned the lease. The Defense Plant Corporation, in turn, subleased the site and leased the machinery to Tavares and Tavares accepted this lease for the date of the term ending December 31, 1947, and this term was automatically extended to December 31, 1949. And then we come to the termination agreement, which provided that, when substantial use of the site was no longer required to construct ships for the government by Tavares, the Defense Plant Corporation could, in writing, give written notice of termination and the lease would terminate in 10 days, or that Mr. Tavares could give similar written notice and the lease would terminate. And, if either party questioned the right of the other, if a dispute arose as to the right of one party or the other to give this written notice of termination, it provides a very simple machinery there for arbitrating that [644] one question. Then it provided the additional reasons why the Defense Plant Corporation could terminate the lease or cancel the lease, in addition to the one reason, the main reason, set forth before, that, when the necessity for constructing ships was over, in addition to that, the Defense Plant Corporation could cancel the lease (a) if all, or substantially all of Tavares' contracts with the government were cancelled prior to completion; second, if the government were denied priority to the use of the facilities; third, if Mr. Tavares or the Concrete Ship Constructors should go into receivership or bankruptcy; and, finally, if Tavares violated any of the terms of the lease. The option, which has been discussed so frequently here, pro-

(Testimony of Edwin A. Mueller)

vided that, upon the termination notice which I mentioned before, the 10-day notice, then the Concrete Ship Constructors should have 90 days to decide whether or not they cared to buy the plant and its facilities, based upon a certain formula, and that formula or that price upon which they would be permitted to buy it was that they were to pay the Defense Plant Corporation or the government of the United States, first, the cost of the land at the price which it cost the United States government; and, secondly, that they were to acquire these facilities, that is, the machinery, buildings, and so forth, according to a certain formula which is spelled out in the lease, that formula having to do with certain degrees of obsolescence, [645] and that certain of the facilities were depreciated at a certain rate, others at a greater rate and others at still a greater rate. And there was an additional stipulation in the contract that the Concrete Ship Constructors would have a right to negotiate for the purchase of only part of it. The option itself states specifically that they must buy all and not part of it. But, in addition to that, according to the contract, if Mr. Tavares decided not to exercise his option and wanted to negotiate for part of the plant only, it is provided for in the agreement that the government will negotiate. It further provides that the Concrete Ship, in the event that they did not exercise their option and the plant were to be sold to someone else, not a department of the United States government, would have the right to pay the same price as the best offer which the government would receive for the land. In other words, to illustrate that, if the government received an offer of \$1,000 from some foreign corporation for that plant and decided it would accept



(Testimony of Edwin A. Mueller)

the \$1,000, the Concrete Ship Constructors could step in there and say, "Gentlemen, we will give you \$1,000 for the plant." Understand, I am just using figures. There are other customary provisions in the contract, which relate to carrying insurance and so forth, that I don't think it is necessary for me to take the time of this court to mention. Those, I believe, are the main features. Now, in arriving at my value of the [646] lease and of the option, I took all of these things into consideration, the fact that the Concrete Ship Constructors had the right to purchase this plant at a depreciated figure. I took into consideration the fact that they had the right to purchase the land at exactly the same cost that it was to the government and that the government had proceeded to condemn this land in 1942 from the city of National City, and that consequently whatever price the government would pay would be the price applicable in 1942. [647]

Now, it is true that under the terms of the option we could not then determine, nor can I now determine, what the price is that the government will have to pay for that rent. That subject is now in the hands of this court and this jury.

However, it appears to me that a buyer, contemplating the purchase of this lease and this option, if he did not have information of what the actual figures were going to be, would have to use his best judgment as to what a fair price for that land would be as of the date of taking in 1942, and as for area A as at the date of taking in 1944.

In other words, that buyer would have to assume that the ladies and gentlemen of the jury of this court would give National City a fair price, and he would have to

(Testimony of Edwin A. Mueller)

estimate that fair price to the best of his ability; at least, that is the way I proceeded.

I took into consideration that under the terms of this agreement after the Concrete Ship Constructors had repaid to the government of the United States all of the funds it had advanced in the form of rent, that from there on, under the terms of the agreement, the Concrete Ship Constructors were to have the free use of that plant and its facilities in the construction of ships for the United States Government.

I think one very, very important feature of this whole situation is this, and I gave it consideration, although I [648] know no way to translate it into dollars and cents, and haven't attempted to, and that is the fact that in 1944, as has been said so often, we were in a state of war, in a very serious state of war. I don't believe anybody could predict the outcome, nor do I know of anybody or did I know of anybody at that time who could predict the length of the war. Now, these ships were necessary, and here was a plant functioning, producing ships, efficiently constructed apparently, because it won the award for efficiency from the United States government for turning out ships. Here was a plant, a going concern, a tool ready to use to produce ships, and I think that a purchaser of this contract and this lease and option would certainly have given that consideration, that he could step in and buy this plant and proceed to operate without delay. There wouldn't be any costly delay of a year, at least, to build the plant, where he would have his money invested, and it would be costing him interest, and so forth, but here was a plant producing ships.

(Testimony of Edwin A. Mueller)

Mr. Landrum: Just a moment. Your Honor, I feel I should interrupt. The witness is making a plain argument now to the jury, with gestures.

The Court: Did you want to say something, Mr. Crouch?

Mr. Crouch: No, I don't want to violate the rule of the court that we should not argue objections unless special permission is given. [649]

The Court: We have to make some allowance for the fervency of individuals, and I suppose the jury will consider all those factors when it comes to weigh the evidence. Some people express themselves differently than others. It is what they say, and not the way that they say it that is the evidence. We cannot control attitudes and temperamental aspects of people. No two people are alike. They talk differently and explain a matter differently. But it is what they say and not the manner of saying it or the inflection of the voice, or the gestures, or anything of that kind, ladies and gentlemen. It is the effect of what they say that is to control you in this case.

Now, have you completed your statement, Mr. Mueller?

The Witness: Yes, your Honor.

The Court: Proceed.

Q. By Mr. Crouch: Have you finished?

A. Yes.

Q. Were you in court this morning when counsel for the government examined a witness concerning the payment of some \$7,000 in salaries, which he claimed or assumed were paid to the officers of the Tavares Construction Company in violation of the terms of this lease?

A. Yes.

(Testimony of Edwin A. Mueller)

Mr. Crouch: I will ask government counsel if they will stipulate that at the time of the payment of the salaries [650] Mr. Rex Seabrook and Mr. Gregory Smith were not officers of the corporation. Will you?

Mr. Landrum: Certainly.

Mr. Crouch: Thank you.

Mr. Landrum: If you say they were not, they were not. I don't know. The record shows it was paid, that Mr. Tavares' salary was paid and Mr. Seabrook's salary was paid.

Mr. Crouch: Mr. Seabrook was not an officer at that time, if you will take my statement for it, and we will take up Mr. Tavares later.

Q. By Mr. Crouch: Mr. Mueller, the witness who was on the stand at the time that matter was brought up, was asked the question: How could you expect anybody to buy this leasehold knowing that the lease was in default because of this quoted violation? Do you find any provision in the contract regarding what happens in the event of any claimed default?

A. Why, yes, the contract provides that.

Q. What page, please?

A. Let me look it up. I didn't know you were going to ask me this.

Q. Well, I may ask you other questions you don't know I am going to ask you. Paragraph 14. What happens under that in case somebody claims there is a default? What does the contract provide? [651]

A. I can only handle one question at a time, Mr. Crouch. In the event of a default, this is the language of the contract. I don't want to read an excerpt here out of the contract. I want to be fair about it.

Shall I read the whole section, your Honor?



(Testimony of Edwin A. Mueller)

The Court: I don't know if that is necessary. Of course, the jury have the contract before them.

Q. By Mr. Crouch: Yes, there is a lot of it that isn't apropos. You may read it, if you wish, but if you can shorten it down by just reading the portion that has to do with my question, please.

A. Well, it cites the reasons for cancellation of the contract, and the last one refers to adjudicating the lessee a bankrupt. Then I will read on from there, "or for the reorganization of Lessee, or for the purpose of effecting a composition or arrangement with Lessee's creditors, and any such petition filed against Lessee is not dismissed within sixty days, or (d) of any violation of any of the terms, conditions or covenants of this lease or extension thereof by Lessee and the failure of Lessee to cure such violation within thirty days from the giving of written notice thereof by Defense Corporation to Lessee."

Q. Thank you. Then you conclude from that, do you, that before the government could cancel this lease they must give the Tavares Construction Company a 30-day notice, [652] and then the Tavares Construction Company would have the right to cure the default?

A. That is what the lease says.

Q. Now, then, applying that particular paragraph to the situation brought out by counsel, and assuming—assuming—that some of the officers got some salary that they weren't entitled to get under the lease, what would be the procedure under the lease then?

A. The Defense Corporation would notify the Concrete Ship Constructors that they considered that a breach of the contract, and then the Concrete Ship Constructors would have 30 days to cure that breach.

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Q. Now, when you were on the stand for the City of National City, you said that one of the factors which it took into consideration was the existence of other leases in the San Diego area. What can you tell the jury regarding that?

A. I repeat what I said before,—that I took into consideration leases on tidelands similar to the subject property and made a comparison of the properties with the subject property, and used those leases as a check of my value.

Q. In your statement made about 10 minutes ago to the jury, you used the expression, “so-called rent.” What did you mean by that phrase? [653]

A. The sum of money collected from the Concrete Ship Constructors upon the completion of each ship, which is designated as rent in the contract, but which is an amount which will retire the principal amount advanced to the Concrete Ship Constructors for the construction of facilities. [654]

It is called rent but it might also be called an amortization fund.

Q. By Mr. Crouch: I believe, when you were on the stand for the City of National City, you said that you were the author of—that you were a member of the California Legislature and were the author of various grants of these tidelands to the City of National City, is that right?

A. I was the author of the 1923 and the 1925 grants.

Q. And I think that you have testified that one of the things which you took into consideration in arriving at your opinion of the value of this leasehold was the fact that, if under this lease the Tavares Construction Com-

(Testimony of Edwin A. Mueller)

pany could purchase this property from the government, it would get a fee title. Will you tell the court and the jury why you made that statement?

A. The original grants to the City of National City, and we can disregard the 1925 grant because all it did was to enlarge the leasing period from 25 to 50 years—the original grant to the City of National City, however, under the 1923 grant, provided that the lands were transferred to the City of National City but it limited their use, or their use is limited, under the constitution, for the purposes of commerce, navigation and fisheries. And it provided further that the lands could never be conveyed away by the City of National City. When I said that the Concrete Ship Con- [655] structors under their contract were to receive the fee title, I meant that they were to receive a title from the United States Government which did not contain that restriction against conveyance. It did not contain any restriction as to leasing the lands. As I understand it, however, the court has instructed us that we are to consider the same features in valuing the land for National City for the purposes of this suit, that there is no restriction to the title.

Q. How did that affect the Tavares Construction Company or the value of its leasehold under this contract?

A. The Tavares Construction Company, had the contract been completed and had the government conveyed this land to them in fee simple, or the Concrete Ship Constructors, would have been the only private owners who held property on the shores of San Diego Bay. They would have been the only ones who had property fronting on the waters of San Diego Bay, who had no restriction as to the length of a lease they could execute,

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who had no restriction as to the alienation of the title to their property, and that is a very valuable right from a business standpoint because very frequently, in fact I think usually, a corporation does not have sufficient funds to finance all buildings and improvements and all of its property and has to borrow. And, as far as I know, banks will not loan money to people for the purpose of constructing improvements on tideland leases in the vicinity of San Diego Bay. [656]

Mr. Crouch: You may cross examine.

Cross Examination

By Mr. Landrum:

Q. I am intrigued by the word "borrow." What do you mean by the word "borrow," to "borrow money"?

A. I mean that an organization that wants to build buildings on a piece of property and does not have sufficient money to do so usually goes to a bank or to a lending institution and borrows money and gives security in the form of a mortgage on this property.

Q. In arriving at your conclusion with relation to the fair market value of the interests of Tavares by virtue of this leasehold, which is in evidence in this case as Exhibit W, you assumed, did you not, that the man who was going to buy it was going to make a success of it?

A. Yes; I assumed he was a good business man.

Q. Do you think he would have had to borrow money, then, if he had a deal like you say here?

A. I don't think it is any reflection on any man's business ability, the fact that he has to borrow money. Even the government of the United States borrows money.



(Testimony of Edwin A. Mueller)

Q. As a matter of fact, they do borrow money down here in the City of San Diego when they only have a lease, do they not?

A. I have no record of any such transaction. [657]

Q. Did you look into that?

A. I inquired very carefully from Mr. Brennan.

Q. Now, I want you to go back to this legislation which you say you introduced in the legislature, both the 1923 act and the 1925 act. The original act of grant to the City of National City provided, did it not, that the City of National City should issue bonds in the sum of \$100,000? Do you remember that?

Mr. Crouch: I object to that as irrelevant and immaterial for the reason that no part of the original act is now the law of this State.

The Court: It may be that, in consideration of the evolution of title, that would be relevant. I can't see how it would. However, the act is here. Counsel has the statutes here. We had better bind ourselves to what was said there rather than to a memory of what was said. I don't recall the exact amount of the bonded indebtedness which was authorized. I think it was in the act of 1918.

Mr. Landrum: 1917 or 1918, your Honor.

Mr. Crouch: Here it is in the 1923 act. And here is the 1925 act.

The Court: I think all that the 1925 act did was to enlarge the period, as I recall.

Q. By Mr. Landrum: The original act, which is Chapter 28, Session Laws of California for 1917, in Section 6 thereof, [658] provides, does it not, that the City of National City shall expend not less than \$100,000

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within five years from the approval of the act? Do you remember that?

A. Just dimly. As a matter of fact, I haven't read the 1917 act lately.

Q. You are the author of the 1923 act, are you not?

A. Yes, sir.

Q. That provision was left out of the 1923 act of which you were the author, was it not? A. Yes.

Q. Why?

Mr. Crouch: I object to that as immaterial. When the legislature made the regrant of these tidelands to the City of National City in 1923, the 1917 act and all of its provisions became obsolete. I would like to pass the acts up to your Honor.

The Court: I read them at one time but I will read them again. I don't believe it all became obsolete; that there were certain features that were corrected by that act. Just hand them to the clerk and he will hand them to the court.

Mr. Landrum: I will hand them all up.

The Witness: What was that question, please?

Q. By Mr. Landrum: The question that I asked was that provision was not renewed in the 1923 act of which you were the author. Why? [659]

The Court: The objection is overruled.

The Witness: Frankly, I don't remember.

Q. By Mr. Landrum: Did I understand you to say that you were the sponsor of the 1923 act of the State of California?

A. Yes, sir. But that was 24 years ago.

(Testimony of Edwin A. Mueller)

Q. And the original act provided that the City of National City should float a bond issue of \$100,000 and spend it on this land, didn't it?

A. I told you I hadn't referred to the 1917 act lately. So, consequently, I cannot give you an intelligent answer.

I will be glad to read it and, if the act says so, that must be true.

Q. Can you tell me whether the City of National City did comply with the provisions of the 1917 act and float a bond issue of \$100,000 and spend it in the improvement of this land?

Mr. Crouch: That is objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

The Witness: No, I can't tell you that.

Q. By Mr. Landrum: Your original act provided that the City of National City couldn't enter into a lease for a period of longer than 25 years, did it not?

A. That is right. [660]

Q. And you amended that provision, did you not?

A. I did.

Q. Why?

A. Frankly, I can't tell you why, what were the reasons given, but it is obvious the 25-year period wasn't long enough.

Q. Why wasn't it long enough?

A. A person wouldn't go in on a 25-year lease and make the same investment that he would on a 50-year lease. I found that to be the case when Consolidated moved in here. They very nearly didn't come in here because they were limited to 25 years.

(Testimony of Edwin A. Mueller)

Q. I understood you to say you had made a very careful study of the leases entered into by the City of San Diego, did you not?      A. I did.

Q. What is your knowledge of those leases?

A. They vary.

Q. They have got some 25-year leases there, haven't they?      A. They have.

Q. And some for 50 years?

A. The City of San Diego has a right to make 50-year leases.

Q. Do you know of any of those leases you investigated [661] in the City of San Diego that were 50-year leases?      A. Yes, sir.

Q. Were you the author of the 1925 act?

A. Yes, sir.

Q. On behalf of National City?      A. Yes, sir.

Q. The 1925 act provides that as to unimproved lands they may enter into a lease for 50 years, together with an extension thereof for another 50 years, does it not?

A. I don't believe the extension clause is in there. I don't think so.

The Court: I will hand that statue to you and you may examine it.

The Witness: I was mistaken. This is the language: "When wharves, docks or piers have not actually been constructed, provided that, where any of said lands are now leased for a period of less than 50 years, the City of National City may extend or renew the same, or make new leases thereon, except that the term of such extension or renewal or new lease shall not exceed 50 years from the date of such extension or new lease."



(Testimony of Edwin A. Mueller)

Q. By Mr. Landrum: At the time you made your appraisal or at the time you prepared yourself to testify in this case, you knew of the existence of a lease to the San Francisco Bridge Company, did you not? [662]

A. Yes; I did.

Q. The San Francisco Bridge Company is a party to this action, for whom you appeared when you testified here in this court room before? That is right, isn't it?

A. I am sorry; I don't understand you.

Q. The San Francisco Bridge Company is a party to this action and they were a party and in this case when you appeared here and testified the other day?

A. That is correct; yes, sir.

Q. Now, you also were aware of the fact that the Tavares Construction Company had received from the City of National City a lease which it took in the place of the lease of the Allied Construction Company lease it had, which was dated January 1, 1942, didn't you?

A. Yes.

Q. You knew that that lease had been assigned by the Tavares Construction Company, under and by virtue of Plancor 407, which is in as Exhibit W, to the Defense Plant Corporation, did you not?     A. I did.

Q. And, therefore, that the government of the United States was the owner of the lease on this property covering that 18 acres, didn't you?     A. The assignee.

Q. Now, in your figure here that you have put up both [663] before and now, did you consider that that lease had any value to the government of the United States?     A. No; I did not.

Q. If that lease had no value to the government of the United States, then how can this other lease that you

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are talking about have a value as against the government? That lease was something that the government owned, wasn't it?

A. Let me understand your question, please. What do you mean by "this other lease"? Do you mean the San Francisco Bridge Company lease?

Q. The San Francisco Bridge Company, on this one right now that you are talking about, Plancor 407.

A. First of all, I have never expressed an opinion as to the San Francisco Bridge Company lease having any value. Now, as to Plancor 407, the elements of value which I find in that contract, which is a lease and an option, do not include any bonus value for the lease itself.

Mr. Landrum: May I have this marked, please?

The Clerk: Plaintiff's Exhibit 5 for identification.

Q. By Mr. Landrum: In other words, as I understand it, you feel that the fact that the government has a lease here which runs for 20 years, I believe, on 18 acres in Parcel 1, and that that belongs to the government, that the government shouldn't claim any value for it? Is that what you [664] say?

A. I said that I ascribe no bonus value to that phase of the contract between the government and the Concrete Ship Constructors.

Mr. Crouch: May I inquire what this is that counsel is showing the witness?

The Court: I haven't any idea. It hasn't been offered. It should be shown to counsel before it is offered.

Mr. Landrum: At this time, if the court please, I offer in evidence a copy—I don't have the original—of a lease which I have been referring to as the lease of the City of National City to Tavares, for the 18 acres, which

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was assigned to the Defense Plant Corporation, and I ask counsel to stipulate with me it may go in evidence.

Mr. Crouch: No objection. [665]

Mr. Monroe: The City of National City will be bound by this testimony, but we will object to it as no sufficient foundation laid, there being no showing of any ordinance for the assignment which is required by the statute.

The Court: If you are objecting as to the authenticity of the proffer, I will have to sustain the objection. What do you mean by that, Mr. Monroe? Do you mean the instrument which counsel produces and which he states is a correct copy, do you mean it has not been certified?

Mr. Monroe: No, I make no objection as to that, your Honor, but I do object to any evidence as to an assignment without showing the authority to assign, as is required by the statute. Frankly, it is my position that there is no valid assignment.

Mr. Landrum: Then you contend Exhibit W, which is Plancor 407, is not a valid instrument, as I understand it?

The Court: I think rights have at least been asserted under the theory that there was a valid lease by the municipal corporation, and also there was a valid lease transferred by the lessee of the municipality to the United States, or, to the Tavares and to the United States. I think we have been proceeding upon that theory, and unless there is some question as to the authenticity of the purported copy which counsel for the government produces, I am inclined to overrule the objection. [666]

Mr. John M. Martin: If the court please, I have supplied counsel for the government, at his request, with the mimeographed copy which he holds. To the best of

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my knowledge, it is a true copy. However, the original, with certain endorsements thereon, is on file with the clerk of the Superior Court in connection with another case. Subject to verification by counsel and upon examination of the original, I will state it is a correct copy.

The Court: Of course, if there be anything upon the original instrument that is not impressed upon the copy which Mr. Landrum has produced, and which he obtained in the manner stated by Mr. Martin, you have a right to correct it.

Mr. Monroe: Your Honor, I am not making any point as to the correctness of the copy. The point that I am making is that there has been no ordinance authorizing any assignment of the lease. The lease itself is valid in the first instance. I make no claim to the contrary.

The Court: No assignment to whom? From whom to whom?

Mr. Monroe: No assignment to the Defense Plant Corporation.

Mr. Landrum: If your Honor please,—

The Court: Just a moment. I want to refresh the court's recollection on something. You do not question the regularity of the lease from the municipality to the Tavares Construction Company? [667]

Mr. Monroe: No, certainly not.

The Court: Dated January 1, 1942?

Mr. Monroe: That is correct.

The Court: The objection is overruled.

The Clerk: This is Plaintiff's Exhibit No. 5 in evidence, heretofore marked for identification.



(Testimony of Edwin A. Mueller)

(The document, heretofore marked Plaintiff's Exhibit No. 5, was received in evidence.)

[Plaintiff's Exhibit No. 5—Tidelands Lease and Assignment thereof. This is same as Exhibit 3 attached to Amended Declaration of Taking and copied herein at pages 129 to 135.]

Q. By Mr. Landrum: I understood you to say that you ascribe or that you give no bonus to that lease; is that right? A. That is correct.

Q. So in order that we may understand what you mean, what do you mean by a bonus upon a lease?

A. That is an expression and term used to indicate a premium value on a lease.

Q. In other words, if I may suggest it to you, it is the price which an owner might receive on the open market for cash for his leasehold interest over and above the rent reserved or the rent that he would have to pay for it; is that right? A. That is correct.

Q. Now, there in that exhibit is a lease which the government of the United States held, running for a period of 20 years on 18 acres of parcel 1, isn't it? [668]

A. That is right.

Q. That lease, which was owned by the government, you say had no bonus? A. Not in my opinion.

Q. But the lease which Mr. Tavares had you say had a bonus of \$500,000?

A. Now, just a minute. Let's clarify that.

Q. All right.

A. In the first instance, you were talking about a lease on 18 acres of land from the City of National City to the Concrete Ship Constructors. In the second in-

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stance you are talking about a lease, coupled with an option which essentially is a contract, involving not only the 18 acres in question, but more acreage, up to approximately 100 acres, involving certain rights as to the purchase of a \$2,700,000 ship plant, and involving many more things other than this 18-acre parcel of land.

Q. Now, just to make it plain, that one isn't worth anything at all, that is right, and that is 18 acres out of this very same land, isn't it?

A. I say that the lease has no bonus value.

Q. All right. So what your testimony really boils down to, in so far as Tavares Construction Company is concerned, it comes out the same way, in other words, it is your opinion that a man would pay \$500,000 more for this setup that we [669] have here, for a shipyard completed and in operation in 1944, December 23rd, than he would have paid for that same shipyard in operation on the 10th day of November, 1942.

A. No, I think I would like to clarify that. My statement is that a buyer would have paid to the Concrete Ship Constructors the sum of \$500,000 for their rights under the terms of Plancor 407.

Q. Yes, sir. And you read to this jury the important portions, or all of the portions in Plancor 407 that you considered of any importance, didn't you?

A. I consider all of them of importance. I didn't read them all. They all go to make up the whole picture.

Q. In response to counsel's questions, you said you had studied it, did you not, and you read to this jury the

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portions thereof which you said you took into consideration and which you considered of importance, didn't you?

A. Those portions which I read were included among all of them, but I had to take them all into consideration.

Q. All right. But to just put it plainly, you did not read paragraph 24 to them, did you?

A. No, I did not read all of the provisions of Plancor 407, because I did not want to take the time of the court. I have said that repeatedly during the examination.

Q. Did you consider paragraph 24 of Plancor 407 of any importance to a man who might be going to buy? Did you [670] read that paragraph to them, Mr. Witness?

A. Yes, I read that, and I gave it very much thought.

Q. Did you read it to this jury today?

A. No, but I would be very happy to.

Q. All right. Now, let me ask you: paragraph 24 provided that the "Lessee will not without prior written consent of Defense Corporation and the approval of the Maritime Commission sell, assign, or pledge this lease or any of its rights or obligations hereunder, or sublease or permit the use by others of any of the property covered by this lease."

With that clause in there providing that that lease cannot be assigned without the written consent of the Maritime Commission or the Defense Plant Corporation, do you think some man would pay \$500,000 for it?

A. Well, before I can answer that question intelligently, I would like to know this: Is it your position that the lease cannot be assigned?

Q. I am not taking any position, Mr. Witness. I am asking you to testify. Now, you told us that, in your

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opinion, a man would pay a bonus of \$500,000 for a lease that had that clause in it, didn't you? That is what you said?

A. I am very sorry. I don't like to disagree with you. If I conveyed that thought to you, I didn't mean to. I said that a man would pay a price of \$500,000 for the [671] rights and benefits which Concrete Ship has under this agreement, Plancor 407.

Q. Well, how much do you think he would deduct, if you say he would pay that for those rights, how much would he deduct from that on account of that paragraph 24 being in there?

A. I asked the attorneys for the Concrete Ship Constructors as to the meaning of this and what its status would be in the condemnation case, and they said that the condemnation itself, the taking by the government, constituted a sale or a taking, a deprivation of the Concrete Ship's rights under this contract, and that consequently, in order to put any value on this whatsoever, it would be necessary to ignore that one clause, and I so did.

Q. All right. Now, it is your testimony that, if you don't ignore one portion of that agreement, then you couldn't give Tavares Construction Company anything; isn't that right?

A. Well, there we go right back to my question.

Q. Yes.

A. I must ask you to clarify your question to me before I can answer. I am sorry, I cannot answer your question.

Q. All right. Now, I understood you to say that you had made a very careful inspection and investigation of the leases which have been executed by the City of San



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Diego and [672] which you used as a basis for your arrival at your conclusion of the fair market value of Exhibit W; is that right?             A. As a check.

Q. Now, I want you to pay particular attention to the question that I am asking. You have been here in the court room throughout the trial of this action, have you not?             A. Most of the time, yes, sir.

Q. You have heard some testimony from the witness stand with relation to leases executed by the City of San Diego, have you not?             A. Yes, sir.

Q. I am going to ask whether or not the City of San Diego makes what they call a lease map, on which they carry all of the leases executed by the City of San Diego.

A. Yes, sir.

Q. I will ask you if you have had an opportunity to examine that lease map and know its contents.

A. I have.

Q. I will ask you whether or not there was a single lease entered into by the City of San Diego from the year 1939 clear down to and including the year 1944, up until the first day of October thereof, where the annual square-foot rent for the first five years thereof exceeded over one cent per square foot. First, can you answer me "Yes" or [673] "No," please?

A. No, I can't. That is the truth, but not the whole truth.

Q. All right. That is the truth.

A. But not the whole truth.

Q. That is what we want, is the whole truth. You heard that testimony from this witness stand, didn't you?

A. Yes, sir, I did.

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Mr. Crouch: Now, pardon me, counsel. I thought you were going to let him tell the rest of it.

Mr. Landrum: I am going to. I am going to ask him now to tell us the rest of it.

Q. By Mr. Landrum: The question which I have asked you was the rental for the first five-year period; that is right, isn't it? A. Yes, sir.

However, those leases do provide that as they progress the rental is increased. Is that the truth about it?

A. That is true, and now with your permission,—

Q. Yes, sir.

A. —I would like to withdraw my first answer to the previous question, in order to check. I have a record of every lease and permit here, and it is my impression that there are one or two that started at a higher rate. [674]

Q. Well, there is one, the Campbell Machine Company lease, entered into October 1, 1944. It is the map letter X.

Q. What do you find?

A. I find another. I am sorry.

Q. All right. Give it all to us.

A. There is a permit, which is a year-to-year agreement, to the Farm Securities Corporation, which is one and one-half cents per year.

Q. Now, you found the Campbell Machine Company lease? A. Yes, I have it here.

Q. And the initial rent on that is two cents, isn't it?

A. May I ask you the date of that lease?

Q. Yes, sir. The first day of October, 1944.

A. Yes, that lease started out that way.

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Q. Now, I think it is proper that I should ask you to do this for us. Explain to us how it comes about that some of us sometimes say that these leases carry a rental of three cents or four cents, and then we will get this straight.

A. That comes about due to the fact that these leases are for a greater period of time than five years. Most of them are for 20 or 25 years, and they graduate each year or each period, and with your permission I will read a typical lease. May I?

Q. You don't need to take the time. I don't think [675] it is necessary.

A. They increase from one cent in the first five years to two cents in the next five, four cents in the next ten, and five cents in the next five years; and it is my contention or my belief that gives an average rental of 3.2 cents per square foot per year for that lease.

Q. All right. Now, are you of the opinion that the use of the facilities of the shipyard were increasing? You said something about the demand for ships. Are you of the opinion that the use of these facilities of this shipyard were increasing from 1943 to 1944, or decreasing?

A. I am of the opinion that they might have increased or decreased, that things were in such an uncertain state that we didn't know which way the war was going, and I wouldn't attempt to say whether they would increase or decrease.

Q. Well, did you make any absolute study of the records of the Tavares Construction Company to determine exactly what did happen there in 1942, 1943 and 1944?

A. Yes, I did examine the records.

(Testimony of Edwin A. Mueller)

Q. Did you find that in the year 1942, which I believe was the year these facilities were first installed and were used, that the total direct hours that this machinery was used was 1,534,000 hours?

A. I can't recall the number. If you will let me [676] see the exhibit, I will be glad to tell you.

Q. Will you take this exhibit, Plaintiff's Exhibit 4, and tell us what it actually shows as to whether the work in that yard was going down or coming up in 1944?

A. In the fourth paragraph on the first page appears this table: 1942, 1,534,000 total direct hours; 1943, 7,283,000 direct hours; 1944, estimated, 2,742,000 hours.

Q. That letter was written by Mr. Eisenman?

A. It bears his signature, yes.

Q. Doesn't it indicate to you, sir, that the work which was being done there in that shipyard was going down in place of coming up in 1944?

A. No, it does not. It indicates there were less hours put in, but it doesn't indicate the cause of that to me. It might be a lull in between contracts. It might be occasioned by many other factors than lack of work.

Q. Do you call a difference between 7,283,000 and 2,742,000 a lull?

A. Well, it is a gap.

Q. Now, as a matter of fact, on the date on which you have been asked to value these properties, they were working on their last contract for the construction of ships for the government, weren't they?

A. I believe they were.

Q. All they had left to do was to complete two more [677] barges, didn't they?

A. That seems to have been the record.



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Q. All right, sir. Now, in arriving at your conclusion with relation to the fair market value of this Exhibit W, or Plancor 407, you first had to determine how much the Tavares Construction Company would have to pay to acquire the land and the facilities under clause (b) of paragraph 15, which is the option clause, didn't you?

A. That is correct.

Q. All right. Now, how much did you include in your figure for the cost of the land?

A. As I explained at some length before, in my direct examination, I had no cost of the land to go on under the terms of Plancor 407.

Q. Yes.

A. So I estimated the value of the land at the amount which I appraised it for in the National City case.

Q. All right. Now, we will start off with that as a basis. You used your appraisal in the case that we are concerned with here to estimate the amount of money that would be the first money, we will say, that they would have to lay down; is that right?

A. Yes, sir.

Q. Had you not been employed by the Tavares Construction Company, what would you have used? [678]

A. I wouldn't have made an appraisal of Plancor 407.

Q. Had you not been employed by the City of National City, then what would you have used?

A. Really, I am sorry. I can't understand your question.

Q. All right. How much then did we start off here with for land?

A. Before I answer your question, I want to say this, that I made these estimates but when I reached my con-

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clusion as to the value of the lease and the option I did not reach it by adding all these estimates together.

Q. Well, it comes out pretty close to an addition of it, doesn't it?           A. No, it doesn't.

Q. All right. I want to use what you actually used. You came in here and said it would take about \$3,000,-000 to purchase this thing. Go ahead and let's have you give us your land, please.

A. The basis of the land that I used was \$617,000, the amount I testified to.

Q. \$617,000. Well, that didn't include parcel 4, it didn't include parcel 10, and it didn't include parcel 11, did it?

A. No, sir. I did include those later, however.

Q. When did you include those? [679]

A. I made an appraisal of those. I am talking now about National City land.

Q. But I am talking about how much you put in when you started to evaluate. When you started to figure the bonus on Exhibit W did your \$617,000 include parcel 4, parcel 10, and parcel 11?

A. I didn't go at it quite that way.

Q. Well, did you put anything in for them?

A. Yes, I did.

Q. What did you put in for them?

A. I put in \$11,600 for parcels 4, 9, 10 and 11, difference.

Q. What do you mean?           A. Difference—

Q. Difference? What do you mean, "difference"?

A. As between 1942 and 1944.

(Testimony of Edwin A. Mueller)

Q. Why did you figure them in 1944 when the government was condemning them in 1942?

A. Yes, but I am assuming and my testimony is based as of December 23, 1944, the date of the taking.

Q. Didn't you include anything that the government was going to have to pay for them? That was your 1942 valuation, wasn't it? I don't understand you. Am I—

A. Perhaps I haven't made myself clear. The 1942 valuation of parcels 4, 9, 10 and 11 was \$23,000. [680]

Q. Well, did you include that here?

A. Now, just a minute.

Q. All right.

A. The 1944 valuation was \$34,000. The difference was \$11,600 odd. I am dropping the odd dollars.

Q. Why didn't you put in the \$34,000? Isn't that what you figure the government was going to have to pay for it?

A. No, I am figuring the difference between 1942 and 1944. I am not figuring what the government is going to have to pay for it. I am figuring the value of the lease and option.

Q. And didn't you have to figure what the government was going to have to pay for the land? That is the first figure you had to put down, isn't it?

A. That is what I did.

Q. All right. Tell me, and we will get along.

A. I figured the difference of all the land—the differential of all of the land between what the government would have to pay for it and what it was worth under the Concrete Ship option at \$320,000.

(Testimony of Edwin A. Mueller)

Q. Well, to do that you would have to figure what the government had to pay for it. How are you going to figure a difference, without knowing what you start with?

A. I did. I just told you what I started with. [681]

Q. \$617,000? A. Plus the 34,900.

Q. All right. How much did you include in your figures for the interests of the San Francisco Bridge Company, which the government must have acquired in order to carry out Exhibit W?

A. That interest is included in the amount which I allocated to National City as a part of the fee.

Q. How much of the \$617,000 that you allocate to National City did you figure for the San Francisco Bridge Company?

A. I stated before, and I will repeat again I did not allocate any portion of that to the San Francisco Bridge Company. I appraised that land in fee. The total included all its parts, including the San Francisco Bridge. So far as the government is concerned it pays National City the amount. If the San Francisco Bridge Company receives anything out of it, that amount will come out of the amount which is paid to National City.

Q. Well, didn't you figure—didn't you take down in arriving at your conclusion,—you knew the San Francisco Bridge Company had the lease, didn't you?

A. I did.

Q. Well, didn't you figure they were entitled to any bonus? [682]

A. I figured it and I ignored the San Francisco Bridge interest to this extent, that it is all included in the National City land. It is a part of the whole.



(Testimony of Edwin A. Mueller)

Q. The San Francisco Bridge Company had a pier on its property, didn't it? A. It did.

Q. Didn't you have to figure the value of that pier in order to arrive at any figure at all for the City of National City, if you included it in their figures?

A. I figured, as I said before, the value of the land included in with National City. I ascribed no special value to the San Francisco Bridge Company lease or option.

Q. You are getting the interests which the San Francisco Bridge Company had, though, if Mr. Tavares takes up this option, aren't you? A. Yes. He is getting—

Q. Calling your attention to this exhibit here, which is in evidence as one of the defendants' exhibits, it is the model, that interest of the San Francisco Bridge Company laid right in here (indicating), didn't it?

A. Yes, I believe so.

Q. That is the best part of it, isn't it, in your opinion, and you are an appraiser?

A. No, sir, there is no best part. It is all usable, and one part—you cannot say that the one part is better [683] than the other. It all makes up one unit.

Q. Calling your attention to Government's Exhibit 1 over here, I am now pointing to parcel 7 on Government's Exhibit 1, right here. That parcel severs parcel 2, parcel 3, parcel 6 from the water, doesn't it?

A. No, sir, it is all in one ownership. I think we went over that thoroughly the last time you examined me.

Q. Well, do you object to going over it again now you appear here for another defendant? A. No.

(Testimony of Edwin A. Mueller)

Q. In arriving at the conclusion which you have given us with relation to the fair market value as to their bonus, or what he would get as a bonus for the purchase of this property, am I correct in saying that you have put the land in there at \$651,900? If I add your \$34,900 to your \$617,000, then am I correct? The figure that I have, and I will repeat it for you, is \$651,900. Do you have a different figure?

A. I didn't go at it quite the way you are doing it. That is why I am so slow. I have the value of the National City property at \$617,000. Then I have the value of parcel 4 and parcels 9, 10 and 11 at \$34,000.

Q. All right. You didn't say \$34,900?

A. Yes, that is it.

Q. Then if you add the two together you would get [684] \$617,000. Now, in arriving at that conclusion you have fixed that figure as the value of this land as it stood on December 23, 1944 and as it would have to be conveyed to Tavares under his option, haven't you?

A. No. Now, let's straighten this out.

Q. All right.

A. The value that I gave to you of \$617,000 was the value of the land to National City in 1942, and of Area A, in 1944.

Q. Now, let me ask you another question. That is clear enough. Did you have available to you what is in evidence in this case as Exhibit Q when you made this appraisal, in order that you might know how much money the government of the United States through the Defense Plant Corporation had spent in the making of the wet docks, and all of those things?

A. Yes, I had all of those figures.

(Testimony of Edwin A. Mueller)

Q. You placed a valuation of \$651,900 on that land. When you were buying it under the option from the government did you take into consideration the fact that in the preparation of that land the government had spent \$515,000? A. I excluded that.

Q. You excluded it?

A. For the reason that that is included in your facilities cost. [685]

Q. Then what else did you add now to this \$651,000 to get the buying price?

A. I added a 50 per cent increase in all parcels except area A. That is \$308,950.

Q. \$308,950. All right, sir. Now, what else?

A. Then I added an additional value to area A of only \$67,000.

Q. What for?

A. For the rise in value of the land, exclusive—

Q. \$67,000 more for parcel A? A. That's right.

Q. Now, parcel A, you gave that an increase separate from the others. Is that the way I understand it?

A. That is right.

Q. All right. Now, what else?

A. That gave me a total of \$994,000.

Q. \$994,000, yes, sir.

A. From that I subtracted the cost to National City.

Q. Then what?

A. The cost of the land to the government of the National City land.

Q. You subtracted the cost to the government of the National City land?

A. This is the value under the option.

(Testimony of Edwin A. Mueller)

Q. I know, but why did you subtract the cost to the [686] government of the National City land when you started to figure how much you were going to pay on the option?

A. The value of your option is the difference between the cost of the land and the facilities. One of the values of the option is the difference between the cost of the land and the facilities to the government, and its actual value at the date of the exercise of the option.

Q. Yes. But in order to arrive at the bonus that would be paid, you have got to know how much Mr. Tavares would have to pay to take up this option, wouldn't you?

A. That is right.

Q. All right. If you are basing it on your testimony, he would have to pay \$617,000 for your original land valuation that you testified to here the other day, wouldn't he?

A. He would to the City of National City.

Q. All right. Then you figured that between the 1942 and the 1944 valuations there was an increase in the valuation of that land by virtue of the general rise in prices of \$308,950?

A. That's right.

Q. All right. Now, that isn't proper to be included in your figure as to the cost, is it?

A. That is not included as costs, no.

All right. Let's take it out, then.

A. I never had it in. [687]

Q. All right. Then you say something about having added \$67,000 for the increase in parcel A. That doesn't belong in here either, does it?

A. It does when you are figuring the difference in value.



(Testimony of Edwin A. Mueller)

Q. I know. I am going to get that. But you are getting to the second question I was going to ask, and that is the trouble with us. Now, you have a total of \$651,900, you add to that 2,141,000, which is the agreed amount, agreed to between the parties to this action, that the depreciated cost of those facilities would be; that is right, isn't it?

A. Yes, if you are going to do it that way.

Mr. Landrum: Yes, sir.

The Court: I think we will suspend now for a few minutes. Ladies and gentlemen, we will take a short recess. Remember the admonition.

(A short recess was taken.)

The Court: All present. Proceed.

Q. By Mr. Landrum: Now, Mr. Mueller, I believe you started off with a land valuation of \$651,900 and, of course, you accepted and used the agreed figure as arrived at between the parties as to the depreciated value of the facilities, did you not, that is shown in here in Exhibit Q, I believe?

A. Yes; I did.

Q. And that, then, added to what you have used as a land value, would make a total of \$2,792,900? Is that the way you figured it?

A. No; that isn't the way I figured it.

Q. Did you add those two together?

Mr. Crouch: I think you should let the witness finish his answer.

The Court: Yes.

The Witness: You are figuring it the way I didn't figure it. If you care to let me explain it to you the way I figured, I think it will save time.

(Testimony of Edwin A. Mueller)

Q. By Mr. Landrum: I will be glad to as soon as you answer one more question and that is that you add \$6,591,900, which you figured as the cost of the land, plus \$2,141,000, and you get a total of \$2,792,900, don't you?

A. Those two figures added together will give the figure you have stated, I think, although I haven't added [689] them, but I don't agree they represent the things you say they represent, and I would like to explain to you the way I did it.

Q. All right; I will ask you to do that as soon as I ask you one more question.

Mr. Crouch: I submit, if your Honor please, that the witness should be allowed to explain his answer before being examined on another phase of the subject—

Mr. Landrum: I will say to your Honor—

Mr. Crouch: Pardon me; I haven't quite finished. I thought counsel had promised the witness that, as soon as he asked him one more question, he would let him do the explaining.

Mr. Landrum: All right; I will do that now.

Q. Go ahead and tell us how you figured it and let me write it down.

A. We were discussing the land. The value of all the parcels as appraised in 1942, the National City tidelands, was \$617,900 and add an additional value, as of 1944, to that figure of \$67,000 for Area A. Then, I add an additional value, as of 1944, of \$308,950.

The Court: What is that for?

The Witness: That is a 50 per cent increase in the value of all parcels except Area A. That gives me a figure of \$994,187, which is the total value under the Concrete Ship op-[690] tion of the National City tidelands.

(Testimony of Edwin A. Mueller)

The difference payable to National City is my original sum of \$617,961, which indicates an added value under the Tavares or Concrete Ship option of \$376,226.

Now, as to Parcels 4, 9, 10 and 11, I found a value, in 1942, of those parcels of \$23,326. I found a value, in 1944, of those parcels of \$34,989. There is a difference in value in the two dates, in the two groups of land, of \$11,663. This is added to the difference in value of the National City tidelands, which gave me a total difference in value in lands of \$387,899, which would be the indicated gain in the difference in the value of the lands. However, I want to stress again that I did not take that figure as my opinion for the value of the lease and the option. That is merely an indicator.

Q. Is there anything else, sir?                    A. No, sir.

Mr. Landrum: All right; that is all.

Mr. Crouch: That is all.

Mr. John M. Martin: The defendant Concrete Ship Constructors rest, if your Honor please, with one possible exception. I haven't yet made known to the jury certain indicated paragraphs of the stipulation and I assume, in due course, that may be done.

The Court: Oh, yes. That may be done. Do you want to [691] proceed now, Mr. Landrum, with the government's case?

Mr. Landrum: I am ready, your Honor.

The Court: Very well.

Mr. Landrum: Ladies and gentlemen of this jury, we have now reached the point in the trial of this case where it is my purpose to state, and very briefly, what the testimony which the government of the United States will

be as adduced from that witness stand. Of course, you understand that until now you have only heard the case of the other side. We shall present the testimony which we present as expeditiously as it may be possible for us to present it. We realize that cases of this character are somewhat drawn out and possibly somewhat uninteresting. It is the desire of all of us, I am sure, to present this matter to you fairly.

The question which you will be called upon by his Honor, as I apprehend, to determine here is simply what is the just compensation which the government of the United States should pay to these people by reason of the fact that it has, by virtue of its powers and for purposes of public policy, seen fit to take and to cancel the leasehold interest of the Tavares Construction Company.

We will, first, present to you, ladies and gentlemen, witnesses who will tell you of their qualifications generally to determine the question of fair market value of these lands. They will follow and give to you a statement of their special [692] study and investigation in order that they might arrive at an opinion with relation to the fair market value of these particular lands.

I believe it is fairly well understood now that the date of valuation upon which the lands should be valued, even including Parcel A, is November 10, 1942.

That is the problem which I believe you will be called upon by his Honor to solve in arriving at your verdict with relation to the land. There may be some testimony here to the effect that Parcel A was first entered upon on the 27th or 28th day of August, 1942. That question has not definitely been settled. If it is thought advisable and necessary, we will give you their estimates of the



valuation of Parcel A on the 27th or 28th day of August, 1942.

These gentlemen whom we will present will be Mr. Ewart Goodwin of the City of San Diego. He will tell you who he is and what his experience has been. He will tell you of the efforts he made to investigate this situation. He will tell you of the efforts that he made to determine sales of lands, similar lands and comparable to this land, in the locality in which these were located. He will tell you of his investigation of leases and rentals and he will give to you the workings of his mind as he arrives at his opinion. And, while I may not have it exactly as I feel that he will give it to you, I say to you that Mr. Goodwin will tell you that, in his [693] opinion, the fair market value of all of the lands, including all of the interests therein, as of November 10, 1942, was the sum of \$310,478. He will tell you how he arrived at it. He will tell you that includes, within itself, his figure with relation to the leasehold interest of the San Francisco Bridge Company. I am not sure, and I don't want to misstate, that that includes his figure with relation to the interest of Mr. Johnson. That is Parcel 9. In any event, his figure will be in the neighborhood of \$310,478.

As the matter is now outlined in my mind, he will be followed by O. W. Cotton of the City of San Diego. He will tell you of his general qualifications and experiences. He will tell you that he went upon these premises, for the purpose of making a specific appraisal thereof, in the month of September, first, 1942; that he went there at the request of the Maritime Commission and the Tavares Construction Company, jointly; that he made his investigation. He will tell you what he did. He will tell you

that from then on he has continued his investigation. He will tell you what, in his opinion, the fair market value of this land was. And, when I say "land," I am talking about everything in this case except the lease, coupled with an option, of the Tavares Construction Company, which you have in your hands and which is Exhibit W. He will tell you that, in his opinion, the fair market value of these premises, as of November 10, 1942, was [694] approximately \$220,000.

Then we will bring to you Mr. George Schmultz of the City of Los Angeles. He will tell you of his general qualifications and he will tell you of his special investigation of these particular lands, what he did. And then he will tell you that, in his opinion, the fair market value of the lands was somewhere around \$250,000.

As to the Johnson interest, each of these three gentlemen will give you their opinion of that. I believe, from my memory, that that figure will range somewhere about \$2500 or possibly \$3500.

We will then have completed the testimony in so far as what we call the land is concerned. We feel that in presenting it to you in this way, we can bring it along gradually as the thing progresses and chronologically.

Then we will take up the question of the Tavares contract, what, if anything, the Tavares Construction Company and its associate, the Concrete Ship Constructors, are entitled to as just compensation, at your hands, for the taking away of whatever rights they may have had under Exhibit W.

This case, very largely, in my humble opinion, depends upon a construction of Exhibit W.

We will present to you, too, Mr. Charles Shattuck and Tom Mason of the City of Los Angeles. They will take

up with [695] you the question of the just compensation which is due for the taking away of whatever rights, if any, may have arisen by virtue of that contract which the Defense Plant Corporation entered into with the Tavares Construction Company on the 27th day of December, 1942. Mr. Shattuck will tell you his experience. He will tell you what study and investigation he has made and, when he is asked the question as to what, in his opinion, is the market value of Exhibit W, his answer, ladies and gentlemen, will be zero, nothing.

He will be followed by Mr. Thomas F. Mason of the City of Los Angeles. He will tell you of his general qualifications and of his special study of matters relating to harbors and tidelands. And Mr. Mason, like Mr. Shattuck, will tell you that, in his opinion, the fair market value of Exhibit W, that is, the bonus, the amount of money which a man would pay to have the rights which Tavares had over there, was zero, nothing.

After that has been fully presented, ladies and gentlemen, the defendants in this case, if they see fit, of course, will present to you what we call rebuttal evidence. His Honor will then tell you what the law is and you will decide it. And your great recompense will be a consciousness of a duty well done.

If your Honor please, if I may be permitted, is it necessary for us to proceed this afternoon? Could we take a re-[696] cess?

The Court: I think so; yes. Could we have some indication as to the probabilities of the time that will be necessary from now on?

Mr. Landrum: I do not think there is any question whatsoever but what all of the testimony will be in in this case not later than Tuesday night.

The Court: How do you feel about that, gentlemen of the defense? Is that your understanding also as to your prospects and probabilities?

Mr. Monroe: I think so, your Honor; yes.

The Court: And Mr. Martin?

Mr. John M. Martin: If I understand Mr. Landrum, any possible rebuttal on behalf of my client will be limited to two witnesses rather than five, which will shorten the time. I think it is true that probably by Tuesday night we will all conclude.

The Court: Then, I think we can take the time between now and Monday morning at 9:30, without any prejudice to the case.

Ladies and gentlemen, this is a long recess now until Monday morning at half-past nine. We are not going to have a session tomorrow but, as I told you on yesterday, if this case prolongs itself into the end of next week, we will have to have a session on Saturday of next week. During this re-[697] cess remember particularly the admonition given not to talk about this case or to suffer yourself to be spoken to or approached by any person concerning this case or anything involved in the trial of the case. You are not to form or express any opinions on the case until it is finally submitted to you. I will ask you to leave those papers here, ladies and gentlemen, over the week-end. You may deliver them to the clerk and he will see that they are left here so that they can be returned to you. We will take a recess until Monday morning at 9:30.

(Thereupon, a recess was taken until 9:30 o'clock a. m., Monday, February 24, 1947.) [698]



San Diego, California, Monday, February 24, 1947.

9:30 A. M.

The Court: All present. Proceed.

Mr. Landrum: Mr. Goodwin, will you come up, please.

EWART GOODWIN,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Ewart Goodwin.

Direct Examination

By Mr. Landrum:

Q. Will you state your name?

A. Ewart Goodwin.

Q. Where do you live, Mr. Goodwin?

A. I live at 202 Nutmeg, San Diego.

Q. How long have you lived in the City of San Diego?

A. 39 years.

Q. How old are you?                    A. 39.

Q. What is your business or profession?

A. I am—

Mr. Crouch: We will admit Mr. Goodwin's qualifications.

The Court: I think they should have the right to show generally what his qualifications are; not too extensively, [700] though.

Q. By Mr. Landrum: Will you state again what your business or profession is?

A. General real estate and insurance business.

(Testimony of Ewart Goodwin)

Q. How long have you been engaged in the real estate and insurance business in the City of San Diego?

A. 17 years.

Q. State briefly for the court and jury your experience in connection with the buying and selling and handling of real estate.

A. During the first four years I was engaged in the insurance and real estate business, I engaged in it under the direction of my father and others in our organization. Since 1934 I have engaged in the real estate and insurance business as an independent appraiser and as an independent broker handling the sale and leasing and management of real property.

Q. Will you tell us, just briefly, some of the lands or interests that you have appraised and how you have appraised them?

A. I have appraised virtually all types of land in San Diego County except mineral or timber lands. I have appraised for various individuals in this area, for institutions such as the First National Trust and Savings Bank of San Diego, the Commercial Bank and Trust Company of New York [701] and various law firms in this community and in the city of Los Angeles. I have appraised for the Connecticut Mutual Life Insurance Company. I have appraised properties in virtually all of the cities in the San Diego County area. I have appraised properties on San Diego Bay. I have appraised for the Rohr Aircraft Company. I have appraised the two principal manufacturing plants in National City, the plant of Schiefer & Sons Furniture and Fixture Plant and I have appraised for the plant of the Solar Aircraft in National City. Those two plants, Schiefer & Sons and the Solar Aircraft, I appraised. I appraised for the United States of America

(Testimony of Ewart Goodwin)

additional areas which they took in 1940 and 1941 at the Destroyer Base, now known as the Repair Base. I have appraised various other types of properties in San Diego, hotels, apartments, downtown business properties, residences and various properties in connection with airport facilities and the like. [702]

Q. Have you made appraisals and special studies of harbor properties, in general?

A. Yes; the appraisals that I did for Rohr Aircraft involved a consideration of certain harbor facilities. I appraised the area that was taken on the northeast corner of Coronado. I appraised the Spanish Bight properties belonging to the City of Coronado and the G. D. and A. B. Spreckels Companies in connection with the acquisition at that time.

Q. In connection with your business operations has it been necessary for you to be familiar with the sales and leases in the City of San Diego and City of National City?

A. Yes. We have operated actively in the City of San Diego and in the City of National City. We have managed properties in the City of National City for our clients, and we have made a number—have negotiated a number of loans on properties in the City of National City, in connection with which it was necessary to form an opinion of the value of these properties and submit them to the persons or corporations that were to take the loans.

Q. Now, we are concerned here with what we know as parcel 9, the Johnson properties, and also certain prop-

(Testimony of Ewart Goodwin)

erties belonging to the City of San Diego. Are you familiar with those properties?

A. Yes, I have been familiar with those properties over a period of many years, more particularly during the [703] time commencing in 1940 when we were engaged to appraise properties in that area in connection with acquisitions during 1940 and 1941.

The Court: Can't you hear, Mr. Crouch?

Mr. Crouch: Yes, your Honor. I want a point cleared up. I understood from the opening statement of counsel for the government that Mr. Goodwin was not being used as a witness against our client, but only as against National City.

Mr. Landrum: My purpose, of course, is to have him testify as to his opinion of the value of the lands only.

Mr. Crouch: Well, I want to know whether or not it is necessary for me to pay any attention to his testimony, if not offered against us.

The Court: You had better follow his evidence, Mr. Crouch.

Q. By Mr. Landrum: Now, Mr. Goodwin, have you made a special study and investigation of the lands with which we are here concerned, being parcel 9, the Johnson lands, and the City of National City lands?

A. Yes, I have.

Q. Now, will you tell us just what you did in connection with that study?

A. Yes. Upon receiving the request to proceed with an appraisal of this property, I assembled maps and plats of the area. I inspected the area, and also inspected maps [704] available in the Harbor Department of the City of San Diego as to the progress of work and projected work



(Testimony of Ewart Goodwin)

in that area. I discussed my own opinions with various other realtors in San Diego and in the Los Angeles area who were familiar with harbor property. I discussed the harbor situation particularly with Mr. Joe Brennan, Port Director of the Harbor Department of San Diego, with Mr. Bub, chief engineer for the Harbor Department of San Diego, with Mr. Ireland, engineer for the City of San Diego, with Mr. Eichenlaub of the San Diego and Arizona Eastern Railway Company, with Mr. Krames, assistant passenger agent of the Santa Fe Railway. I obtained information as to the leases existing on the various properties, on the tidelands of the City of San Diego that might be susceptible of comparison with the properties that we were to appraise in the City of National City. I also reviewed other tideland areas available on San Diego Bay, some areas to the south of the subject property, and certain areas that would be available in the City of Coronado, also, of course, on San Diego Bay. I investigated and brought myself up to date as of that time on the housing situation in San Diego and in National City, and the state of the labor market in this area at that particular time.

I studied the development of the district, its accessibility to workers from the standpoint of transportation, buslines, and the like, that would bring them to their work in [705] this particular district. I studied the development of the district. I, of course, have been familiar with it over a period of many years, but studied it further with a view of reaching an opinion as to those trends for the time being and in the future.

(Testimony of Ewart Goodwin)

Q. Mr. Goodwin, did you make an effort to gather information with relation to the sales of property which you considered similar and comparable to this?

A. Yes. Of course, as to sales of tideland property as such, there weren't any. As to sales of industrial lands both in the City of San Diego and in the City of National City, there were some; a number in the City of San Diego, and there were very few in the City of National City.

I was interested in checking those sales with particular reference to interpreting them in view of the condemnation of the parcel that has been referred to as the Johnson parcel, and as to the areas in the tidelands that were being condemned that were something in excess of 1,000 feet from frontage on deep water.

Q. Did you find any sales which you felt you could use in arriving at your opinion? A. Yes, I did.

Q. Did you have knowledge of a sale that has been discussed in this case as having been a sale to a Plywood company? [706]

A. Yes, I was familiar with that sale from the San Diego and Arizona Eastern Railway Company to the Plywood Structures Company, also known as Stewart & Bennett.

Q. Now, I will ask you whether or not that property was sold in 1942.

A. Yes, that property was sold on April 1, 1942.

Q. Do you know who sold it?

A. Yes, it was sold by the San Diego and Arizona Railway Company.

Q. To whom? A. To the Plywood Structures.

Q. Was it sold again in 1944, if you know?

A. Yes, it was. At that—yes, it was sold in 1944. [707]

(Testimony of Ewart Goodwin)

Q. By Mr. Landrum: Do you know the price that was paid for it on the first sale in 1942?

A. Yes; I do.

Q. Do you consider that sale one which might be comparable to the lands known as the Johnson lands and the upland with which we are here concerned?

A. Yes; I consider it quite comparable.

Q. Now, did you find any other sales—

Mr. Crouch: Pardon me; I didn't quite understand. You are asking was the sale comparable. Do you mean comparable to National City land or comparable with the Johnson sale?

Mr. Landrum: I asked him if he considered it comparable with the Johnson land and the upland with which we are here concerned.

Mr. Crouch: May I have the question read?

(Question read by reporter.)

Mr. Landrum: You may answer.

The Witness: Well, I think possibly it might be anticipating something from the standpoint of the sale being comparable. The land is what I referred to as being comparable or susceptible of comparison. Of course, one was tidelands and the other was land that was owned in fee and to which the fee was transferred.

Q. By Mr. Landrum: Were there any buildings on the property at the time of the first sale? [708]

A. No; there were not.

Q. Were there buildings on there at the time of the second sale? A. Yes; there were.

Q. Do you know what they were?

A. Yes. The second sale involved not only the property in Block 281 of National City but also approximately

(Testimony of Ewart Goodwin)

half of the block to the north. In the property to the north, which was included in the second sale, there was located an office and warehouse building on one portion and on another a warehouse building, that was occupied at the time of the second sale by the Sperry Flour people. On the property that was the subject of the sale, or a portion of it that was subject to the sale, in April, 1942, it had located, I think, a warehouse.

Q. Did you find other sales that you took into consideration and considered in arriving at your conclusion?

A. Yes.

Q. Will you take some of them, giving us the name of the seller, the name of the buyer, the date of the sale, but I don't think it is necessary for you to state the price at which it was sold?

A. On October 30, 1942, there was a transaction on a piece of property lying between National Avenue and the San Diego & Arizona Railway right-of-way. This piece of property [709] consisted of approximately 34½ acres. The seller was George V. Johnson and Mildred J. Johnson and the buyer was George D. Shanahan and John H. Shanahan. The more easterly portion of this property was zoned for light manufacturing and the most westerly 500 feet of it in depth, paralleling the railroad right-of-way, was zoned for heavy manufacturing. Most of this property was on original good, solid ground. About one-fourth of it was located on low and marshy ground. This area was comparable to the Johnson property and susceptible of comparison to these areas of the tidelands.

Q. Did you have other sales?

A. I considered the listing of the Santa Fe Railroad on a piece of property directly north of the Johnson parcel



(Testimony of Ewart Goodwin)

and also considered the lease that existed on that property from the Santa Fe Railroad to the Tavares Construction Company.

Q. What was the purpose of your appraisal? What were you going to determine?

A. I was endeavoring to form an opinion of the fair market value of the various parcels, together with the fair market value of the lease that was held by the San Francisco Bridge Company.

Q. What do you understand the words "fair market value" to mean? What is your definition of that, Mr. Goodwin?

A. Well, the fair market value is the highest price, in [710] terms of money, that a given piece of property would bring, exposed for sale on the open market, with a reasonable time to find a buyer willing to buy, not compelled to buy, selling to a seller who is willing to sell, but not compelled to sell, each having a knowledge of all of the conditions, advantages and disadvantages, surrounding the given piece of property, and a reasonable time to find such a buyer and conclude a sale.

Q. I understand you to say that you found and took into consideration some leases, did you not?

A. Yes.

Q. Will you tell us about those leases that you felt that you could consider in arriving at your conclusion?

A. Virtually all of these leases, other than the one referred to, were leases that had been made by the Harbor Department of the City of San Diego to various persons, firms and corporations, who were operating on the tidelands area of the City of San Diego.

(Testimony of Ewart Goodwin)

Q. Where did you get your information with relation to those leases?

A. From the Harbor Department of the City of San Diego.

Q. Do you know the terms of those leases?

A. Yes. The terms, of course, varied.

Q. What kind of leases were they? How long did they run? [711]

A. Well, all of the bulk of them ran from 15 to 25 years.

Q. Were they a straight lease for that period of time or was it a lease with an option to renew?

A. There were some that were straight leases up until 1941 and, in 1942, the bulk of the leases that had been made were what we might call straight leases or a time lease. There were at that time, and starting then in an accelerated way, no more leases made on a five-year basis with an option for an additional term resulting from—

Q. In other words, the lease provided that it ran five years and then, if the lessee wanted to renew it for another five, he could do it? Is that what you mean?

A. Yes; usually at a graduated rental. They were not all, however, on that basis.

Q. Have you prepared for us a map, what we would call a lease map, showing the leases that you considered?

A. Yes; I have.

Q. Could I have it, please, sir?

Will you mark this for identification?

The Clerk: Plaintiff's Exhibit No. 6 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 6 for identification.)

(Testimony of Ewart Goodwin)

Q. By Mr. Landrum: Mr. Goodwin, I show you Plaintiff's Exhibit for identification No. 6 and I will ask you to examine [712] it and state what it is.

The Court: Have you seen this map, gentlemen?

Mr. Monroe: No, your Honor.

The Court: You may look at it first.

Mr. Crouch: If Mr. Goodwin takes the map direct, we have no objection.

Mr. John M. Martin: No objection.

Mr. Landrum: I understand, your Honor, there is no objection. And may it be understood that this exhibit is in by agreement?

The Court: So ordered, and it will be marked as Plaintiff's Exhibit No. 6 in evidence.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 6.)

Mr. Landrum: May we put it on the easel?

The Court: Yes.

Q. By Mr. Landrum: Mr. Goodwin, will you be good enough to step down here to the easel with me? Using Exhibit 6 to illustrate your testimony, will you tell the court and jury just what is shown on Exhibit 6?

A. There is shown, in reddish or pink color, on Exhibit 6 the property that is the subject of this particular trial, delineating on it the entire taking in this particular action. The various parcels shown are, starting off with Parcel No. 1, the area that has been referred to, and the [713] area that was, in 1942, leased by the Tavares Construction Company; parcel No. 2, an area that Tavares Construction Company had had under lease at an earlier date; Parcel No. 3, being an area as of the date of the taking

(Testimony of Ewart Goodwin)

in November, 1942, which was still owned by the City of National City but had not been leased to anyone at that time. Parcel No. 5 was a railroad "Y" that had been used by the Santa Fe Railroad, being a "Y" which should be and is distinguished from a spur track, since, under the agreement with the Railroad, it could not be used as a spur track facility. Parcel No. 7 was an area that had been leased from the City of National City by the San Francisco Bridge Company, which area extended out into Area A a distance of 533.25 feet by seven hundred and some feet. It is not shown on here and I don't remember how far exactly it ran from east to west but it would be from the westerly line of this parcel and ran to and intercepted an extension of the east and west line on the north boundary of the same parcel, what we call an oblique parallelogram. Parcel No. 8, shown on this map, was an area that had been leased by the City of National City to a water taxi company, but which lease on the date of taking had been in default for some 10 or 11 years, and the balance of Area A was the area that had not been dredged but was to be dredged as a basin for anchorage of ships and construction of wharves. Parcel No. 9 is the parcel that has been referred to as the Johnson [714] Parcel and is shown on the exhibit, Parcel No. 10 being the area immediately north of the Johnson parcel, that is not the subject of this trial.

Q. Now, the blue that you have over here—what does that mean? Is there any way that you can tie that in to some record that you have?

A. The areas delineated in blue, marked by and pointed to with certain letters of the alphabet designating them, are various leases that have been entered into from 1939



(Testimony of Ewart Goodwin)

on. They might not be accurate as of today. There has been a constant process of negotiation whereby one concern would give up a little bit of land and another concern would take it on. But they indicate the various leases that had been entered into on or about the date of taking.

Q. I notice on Exhibit 6, for instance, the letter "E." What does that mean?

A. The letter "E" would designate that particular lease solely for reference, so that they could readily determine the amount of the rent that was being paid for that particular parcel.

Q. Do you have information on that lease? We will just take "E." Tell us who leased it, to whom and when.

Mr. Monroe: That we will object to as incompetent and immaterial.

The Court: Overruled. [715]

The Witness: "E" was a lease from the Harbor Department of the City of San Diego to the Marine Construction Company. It covered an area of 172,224 square feet or 3.95 of an acre. It was a lease for five years, from 1939 until 1944.

Q. By Mr. Landrum: Do you know the rental that was to be paid?     A. Yes.

Q. Do you know the rental that was to be paid on all of these leases?     A. Yes.

Q. You have the same opinion on all of these leases here, do you not, that you have given us on that one?

A. Yes; I do.

Q. All right. Mr. Goodwin, there has been some discussion in this case with relation to what a witness had

(Testimony of Ewart Goodwin)

termed plottage, plottage value. What is plottage value, as you understand it?

A. Plottage value is usually used as an expression indicating whether or not, in the opinion of one individual, a given piece of land has plottage value. Property might have plottage value because in a residential district it is of an ideal size and type for the type of improvement that goes in that particular district. The same might be true in an industrial area because it is ideal for the type of industry that is attracted, either because it is smooth or, [715a] on the other hand, because it is of a particular size. It is also used as indicating, for example, a plottage value of a piece of vacant land as compared to a piece of land adjoining it that might have improvements on it, for which you wanted to use the land, and did not see fit then to use it. If you bought the improved land and then had to tear down the buildings and start from there, you might say the unimproved land had a plottage value in comparison to what it cost you, not having to expend the same amount of money on the unimproved parcel to get it in shape to start off with the development which you proposed. [715b]

Q. Well, now, this particular land with which we are here concerned known as the City of National City land, there was a discussion here about inasmuch as that was a large block of land, that it would give an added value to this area. Step down here to this map and tell us what you think about any plottage value to that property.

The Court: You are referring to Exhibit F?

Mr. Landrum: To Exhibit 1, your Honor.

The Witness: Referring to Exhibit 1, and considering the plottage value of that particular property taken as a

(Testimony of Ewart Goodwin)

whole, it had certain advantages from the standpoint that you did have some considerable amount of land available in one piece. It, however, had certain very definite disadvantages, in my opinion. Parcel No. 1 had been leased to the Tavares Construction Company and parcel No. 7 had been leased to the San Francisco Bridge Company. As a result parcel No. 3 had been divided from the frontage on the deep water, which is the principal advantage of tidelands area or any water-front area. The rear portion of parcel No. 3 was over 3,000 feet from the deep water and had access only to it at its most westerly boundary, and even at that point did not front on deep water at the date of taking. It was also intercepted by the Y of the Santa Fe Railroad, and while I believe it would be reasonable to assume that some deal could be made for their Y, if it served the advantage of the City of [716] National City, it could only have been done at some expense to the City of National City or the prospective lessee that they might have had in mind, to whom they might have leased the property.

Q. By Mr. Landrum: All right. Mr. Goodwin, what did you find with relation to the availability of other tidelands about this time?

A. The tideland that fronted on water of an adequate depth over which large ships could navigate was very restricted at this time. There were considerable other properties to the south of this property that could be brought into use and made available to use, but only at a cost, the cost of dredging them and the cost of depositing the spoil in the fill. There were only a comparatively very small number of acres still remaining in the tidelands of the City of San Diego. There were approxi-

(Testimony of Ewart Goodwin)

mately 100 acres in the City of Coronado, some of which had been made available only a matter of a year, or during the year prior to the date of taking here. A good substantial portion of the better area in Coronado was not in use at the date of the taking with which we are concerned here. The area to which I refer is that which was later taken and put to use as a housing project, in the northeasterly tip of the island. As for properties that could be put to immediate use, in tidelands there were very few.

Q. Did you consider that in arriving at your cost?  
[717]

A. Yes, I did.

Q. From your experience in connection with buying, selling and handling real estate, and your own personal inspection of this land, do you have an opinion as to the fair market value in this action of the property known as parcel 9, the Johnson parcel, as of November 10, 1942, giving to it all uses for which it was suitable or available as of that date?

A. Yes, I do.

Q. What is your opinion of that market value of parcel 9 on November 10, 1942?

A. In my opinion, the fair market value of parcel 9 was \$2500.

Q. Now, will you just briefly tell us the factors that you took into consideration in arriving at that conclusion?

A. The factors that I took into consideration in arriving at the conclusion, my conclusion as to that particular parcel, had to do with the sale of the parcels that I previously mentioned, that I considered comparable, and the fact that there was a large amount of vacant land still remaining in the City of National City that was comparable to this and that would be in competition with it.



(Testimony of Ewart Goodwin)

I considered the price at which the Santa Fe Railroad was willing to dispose of an area similar in size immediately to the north of it, [718] and I considered the lease on that particular parcel, as I did the lease on this parcel 9 between Mr. Johnson and the Tavares Construction Company.

Q. From your experience in connection with the buying, selling, handling and appraisal of real estate, your own personal study and your inspection of the property known in this action as the National City lands, do you have an opinion as to the fair market value of those lands as of November 10, 1942, for all uses for which, in your opinion, it was suitable or available on that date, leaving out, however, any enhancement or increment in that value due to the expenditure of government moneys prior to that date upon it? A. Yes, I do.

Q. All right, sir.

A. First, for clarification, I am including in my value, however, the improvements that had been made by the San Francisco Bridge Company.

Q. Yes, I understand that. But you are leaving out any improvements made by the expenditure of government money? A. Yes.

Q. All right, sir. A. \$310,475.

Q. \$310,475. Now, within that figure I take it you included what you considered to be the fair market value [719] of the leasehold interest of the San Francisco Bridge Company, did you not? A. Yes, I did.

Q. Will you state to the court and jury what proportion of your \$310,475 you allocated to the leasehold of the San Francisco Bridge Company? A. In dollars?

Q. Yes, sir. A. That would amount to \$45,750.

(Testimony of Ewart Goodwin)

Q. \$45,750 for the leasehold interests of the Bridge Company, and that included the pier or any structures that they had on there?

A. Yes, that included their leasehold interest, including all increments of value.

Q. How did you arrive at your conclusion with relation to the fair market value of the Bridge Company's leasehold interest? Will you break that down for us and tell us your reasoning, as you got that figure?

A. The San Francisco Bridge Company had a lease on the area known as parcel 7, and an extension of the boundaries as I previously explained. That amounted to \$10 a month for the first 10 years of the lease and amounted to \$50 a month for the last 10 years of the lease. In arriving at my opinion of the value on the San Francisco Bridge parcel, I computed the income of \$120 a year times the present value [720] of \$720 a year, receiving it annually over a period of eight years at three per cent, which amounted to \$842.40. I added to that the present value of \$600 a year, deferred eight years at three per cent, which amounted to \$4,039.80. Treating the area as a separate parcel, and considering that the entire parcel had a value of \$77,925, the present value of that amount of money deferred 18 years was \$27,297.13. That amount, therefore, was the amount of interest the City of National City had, expressed in dollars, in this particular parcel of land, which represented a total figure of \$32,175. Subtracting that amount from the \$77,925, we have remaining \$45,750 to be the leasehold interest of the San Francisco Bridge Company.

(Testimony of Ewart Goodwin)

Q. Can you describe for us the structures that the San Francisco Bridge Company had on there?

A. The main structure, consisting of a wharf on the San Francisco Bridge Company property, had a width of 30 feet and a length of 100 feet, with an approach about 16 by 60. They had—there were 10 wood piles on the north side of the main structure, braced with 1 by 12 stringers set in the piles near the top. The water line was protected at the water line by piles with heavy chains through each pile to anchors. That, briefly, would describe the structure.

Q. Now, just discuss with us and tell us your reasons, the factors that you used and the reasons in your mind when [721] you arrived at this conclusion of an overall figure of \$310,475 covering the entire fee in this land we know as the National City lands. Of course, that includes this Bridge Company's figure also?

A. Yes.

Q. Tell us briefly how you thought that thing over.

A. In the absence of any sales that could be directly compared to the entire area, it was my opinion that the fairest method of approach that could be used would be, first, an estimate of the amount of rent that the property would bring. In line with the practice of the City of San Diego, of renting areas that fronted on deep water at the bulkhead line, I felt that the most logical method of approach would be to consider that the value created by the existence of area A as a water front was reflected in the other areas that are the subject of the condemnation; in other words, that area A was comparable to a street or a right-of-way that was used for the benefit of the parcels fronting on it, and that the value of front-

(Testimony of Ewart Goodwin)

ing on a street or right-of-way would be reflected in the rental income of the parcels that fronted on it.

Using that approach, I then allocated what, in my opinion, was a fair rental—might be a fair rental in view of all the conditions that I knew of, and considered might be a fair rental for the various parcels that are the [722] subject of the trial, and then in capitalizing those figures I had one test of the fair market value of the particular property.

Q. At what rate did you capitalize it?

A. Seven per cent.

Q. Do you consider that a fair rate of capitalization on this character of property?

A. Yes, bearing in mind that at a seven per cent rate a city, just like—well, while they don't pay taxes, they do have certain very considerable expenses in services to the tidelands area, whether you would consider it an additional cost or the costs that develop over a period of time, in giving the area police protection, fire protection, certain rubbish and pick-up facilities on the streets that abut the area; the amount that must over a period of time develop and go into overhead in overseeing or retaining men in the city government or in the Harbor Department that are competent to negotiate with prospective lessees and carry on certain services and facilities,—offer certain facilities to the harbor areas.

Q. I want to ask you whether or not you made an investigation and determined what the situation was, in so far as income received by the City of National City for these lands was, prior to the year 1942.

A. Yes, I did. [723]



(Testimony of Ewart Goodwin)

Q. What was the situation, in so far as the City receiving an income from these properties prior to that date?

A. Well, outside of the lease to the San Francisco Bridge Company, they had not received any income from the properties, anything substantial or anything more than a nominal rent that might have existed from time to time from some use of the property.

Mr. Landrum: You may cross-examine.

Cross Examination

By Mr. Monroe:

Q. Mr. Goodwin, in your qualifications you did not say that you were a licensed broker, but I presume you are?     A. Yes.

Q. Do you belong to any organizations of licensed brokers?     A. Yes, I do.

Q. What are they?

A. I belong to the San Diego Realty Board, the California Association of Real Estate Agents, the National Association of Real Estate Agents. I am a member of the National Brokers Association, and a member of the American Institute of Real Estate Appraisers.

Q. With reference to the San Diego Realty Board, that is composed of brokers in the City of San Diego and other affiliate members; is that right? [724]

A. Yes.

Q. Do you recollect offhand about how many licensed brokers belong to that organization?

A. In the City of San Diego?

Q. Yes.     A. Why, I would say in excess of 200.

Q. If I would suggest 240, that would not be far off, would it?     A. I beg pardon?

(Testimony of Ewart Goodwin)

Q. If I would suggest 240, that would not be far off, would it? A. That is about it.

Q. That is broker members of the Board?

A. Yes.

Q. There are a great many other brokers in San Diego that do not belong to the Board?

A. Yes. Well, I don't believe there are a great many brokers that don't belong.

Q. Now, let's take first, Mr. Goodwin, the matter of the San Francisco Bridge lease. I take it that you consider that that lease had an added value or a bonus value by reason, first, of there having been some improvements made on the property and, second, because of the favorable terms of the lease? A. Yes. [725]

Q. Now, I think you stated, if you have your figures before you there, that the value of the entire parcel, that would be the 16.46 acres covered by the San Francisco lease, was \$77,925; is that right? A. Yes.

Q. That is the figure that you gave?

A. Yes, it was a little less. It was less than 16 acres.

Q. How is that?

A. It was somewhat less than 16 acres.

Q. You are right. It was 14 and a fraction acres?

A. Yes, sir.

Q. That is right. 6.26 acres out of area A and 8.2 acres out of parcel 7; is that right? A. Yes, sir.

Q. It was 14.46 acres. Now, first, how did you arrive at that value of \$77,925 for the entire parcel?

A. It was my opinion that the area known as parcel 7, which is colored with the— well, there are two or three blues on it, but I imagine everyone is familiar with it by this time—that the area consisting of 6.26 acres front-

(Testimony of Ewart Goodwin)

ing on area A could have rented as an area having access to the water, or, the area that had been dredged to a depth of 10 to 13 feet, and would have a rental value of 2 cents a square foot. [726]

Q. All right. You capitalized that at seven per cent; is that right?             A. Yes.

Q. And that brings the figure of \$77,925?

A. Yes.

Q. When we say that we capitalize it, what we mean is, Mr. Goodwin, that we take the amount of money which, if invested at seven per cent per annum, would produce the same amount of income as you figure is the rental value; is that right?             A. Yes.

Q. So that what you do is simply take the income or what you estimate is the reasonable income from the property, and you take the amount of money that at seven per cent would produce that income?

A. That is right, considering all the other factors, of course. [727]

Q. By Mr. Monroe: In taking that overall value for that 14 and a fraction acres, did you take into consideration any added value by reason of the improvements which the San Francisco Bridge Company had, themselves, placed on the property?

A. Yes. In other words, when I placed the value that I felt that property would bring on a lease, I considered the property in the condition that it was in on the 10th of November, 1942.

Q. I am trying to get at, if I can, the question of figures. Have you in mind or did you give any figure

(Testimony of Ewart Goodwin)

of valuation of the improvements which the San Francisco Bridge Company had made?

A. I had in mind and knew of what it was but, in considering what it would rent for, you couldn't break it down because it was one parcel of property. You couldn't break it down as to what one piece was worth or one improvement was worth, and add it to the remainder.

Q. You haven't, then, broken it down as to how much added value in dollars there was by reason of the improvements, how much that added to the total value of the plot?

A. I don't think that you can say exactly how much it added. You had a piece of land of a certain size that could be rented and it had a certain rental value. I considered the improvements and considered, of course, that the property [728] was dredged. In reaching my opinion as to value, and being interested in all facts that surrounded it, I estimated what the wharf would cost and what the dredging might have cost, and had that in mind at the time I reached my conclusion; in other words, as to what it would have cost for anyone else to put themselves in the same position that the San Francisco Bridge Company enjoyed.

Q. Is this the fact, Mr. Goodwin, that an improvement does not, necessarily, add to the value of the land to an extent equal to the entire cost of the improvement?

A. Yes; that is correct.

Q. And sometimes it does?                      A. Yes.

Q. Sometimes a fellow will build a house on a piece of property that does not enhance the value of the property anywhere near the cost of that house? That is correct, is it?                      A. Yes, sir.



(Testimony of Ewart Goodwin)

Q. As to these particular improvements, would you think that they enhanced the value of the property something comparable to their price, or would you think that enhancement was something less than the price?

A. I would say they enhanced the value of the property, certainly, to the extent of their cost and, in my opinion, in addition to the extent of their cost.

Q. Then, you would say that you would think that the [729] cost of them—whatever might be the reasonable cost would enhance them to that extent?

A. I think it did in this instance; yes.

Q. What approximately would you figure as the reasonable cost of those improvements?

A. In my opinion, the reasonable cost of the wharf was in the neighborhood of \$12,000 and the reasonable cost of the dredging of the area that they had leased at that particular time was in the neighborhood of thirteen to fifteen thousand dollars.

Q. All right. Then, taking that altogether, you would figure that the reasonable enhancement of the value of the entire parcel was from twenty-five to twenty-seven thousand dollars by reason of the improvements that had been put on there pursuant to the lease?

A. Yes, sir.

Q. And am I correct that you feel that those improvements would enhance the value of the property itself and would, also, enhance the value of the leasehold?

A. Yes; it had an effect on the entire area.

Q. Now, you would figure, then, that there is something in the nature of \$20,000, in addition, that is an

(Testimony of Ewart Goodwin)

added value to the leasehold because of the favorable terms of the lease, is that right?

A. Yes; the conditions that existed at the time. [730]

Q. Now, let's see if we understand one another as to how that comes about. If a piece of property has a rental value of \$100 a month and you own it and you lease it to me for \$100 a month, you would figure there was no increased value by reason of the terms of the lease, is that right?

A. Probably.

A. In other words, the theory is that, if property is leased under a lease which calls for its reasonable rental value, there isn't any bonus value to the lease arising by reason of the terms of the lease?

A. That is right.

Q. And so that it is only when the owner leases property for less than its worth there comes to be a bonus value by reason of that leasing?

A. Yes. I am not sure, just thinking about it quickly, that the expression "less than its worth" might be a logical, fair expression under all of the conditions but, generally speaking, it is less than the value that possibly the other man, with funds, equipment and facilities, can get out of it.

Q. In other words, it is because of the terms of the lease, because they are very favorable to the tenant, that the tenant has a value to his leasehold estate?

A. Yes.

Q. So that, if the owner makes a lease of his property for a very small amount of rent or an amount of rent that is [731] less than the reasonable rental value, and that lease is for a period of time, in effect, what that

(Testimony of Ewart Goodwin)

owner has done is he has, by executing that lease, transferred to the tenant a valuable interest in the property?

A. Yes; he has given away the profit, if any, in the lease for that period of time.

Q. And he has, therefore, depreciated a corresponding part, the fee title to the property?     A. Yes.

Q. In arriving at that conclusion as applied to this particular piece of property, did you bear in mind that this was tideland?     A. Yes, sir.

Q. And did you bear in mind the proposition that by the constitution and by the statutes the officials of National City were prohibited from transferring any interest or any part of the fee and that any transfer they would make, by which they would transfer any part of the fee, was void?

A. Do you mean unless they consented to it at a later time?

Q. Whether they consented to it or not, did you consider that?

A. I considered the statute, I believe the provision in it to which you have reference. And, in considering the value, we must also, in fairness, consider the value that it [732] had to the San Francisco Bridge Company in use.

Q. That is not what I am getting at. What I am getting at is whether you considered in arriving at that conclusion that the officials of National City are prohibited by law from making any agreement by which they would transfer any part of or any interest in the fee title?

A. Oh, in the fee title?

(Testimony of Ewart Goodwin)

Q. Yes.           A. Yes.

Q. As a matter of fact, in determining that there is a bonus value because of the favorable terms of the lease, you have considered the property just the same as though it were owned by a private owner, have you not?

A. I don't know that you would say it was just the same. I certainly considered the San Francisco Bridge Company was in possession and had the benefits that would accrue from the remaining 18 years of the lease.

Q. In arriving at the conclusion that there was a bonus value by reason of the favorable terms of the lease, you have used the same figures and have arrived at the same conclusion as though the property were owned by a private owner?

A. I don't believe I would say I have 100 per cent done that because we don't have exactly the same set of facts. I would say I would have used certainly the same or a very similar approach in arriving at the conclusion. [733]

Q. In arriving at that conclusion, did you take into consideration the proposition that, if that lease contained a provision that, in case of condemnation, a portion, a percentage of the amount received for the property, should be paid to the San Francisco Bridge Company, such provision of the agreement would be void under the constitution and statutes of California?

A. Had it contained such a provision.



(Testimony of Ewart Goodwin)

Q. No. I am just asking you whether you considered that.

A. I would say that I considered it because there are many leases that do have a provision, that, in the event the leasehold interest, if any, shall be condemned, an amount shall be paid in that way.

Q. Did you consider such a proposition, that such an agreement would have been void in the case of tidelands?

A. No; I did not.

Q. In arriving at your valuation of the entire parcel, Mr. Goodwin, you capitalized what you took as the overall rental of the entire parcel, and then you proceed, as a matter of computation, to figure the amount of money which, invested at 7 per cent, would produce what you considered as the overall rental value? A. Yes, sir.

Q. Now, in arriving at that consideration, did you consider that in making these tideland leases the municipal [734] government takes into consideration the amount of taxes that they will receive from improvements that are going to be placed on the property?

A. No; I don't believe that that is possible to figure accurately.

Q. In other words, that is just something which, if eliminated, is a matter of bad luck for the City, is that right?

A. No; I wouldn't say so but it isn't susceptible of direct interpretation as to what the City might have done. It couldn't be said that, necessarily, it is bad luck. That would depend on whether in eliminating it the City got as sound a tenant in the second place as it had in the

(Testimony of Ewart Goodwin)

first place. It might be good luck. If the tenant that came along was sounder and paid salaries year in and year out, through periods of depression and otherwise, they might be better off.

Q. We are now speaking or dealing with the value upon taking and, if I get your answer correctly, you are eliminating from consideration the proposition that the City is deprived of any right to tax any improvement?

A. No; I considered the full picture as to what the City's rights were and were not.

Q. Now, let's go back to the question of the rental value. Do you consider the rental value that it had at [735] the time or do you consider it as an average rental that it would receive over a period of years in the future or that it would be entitled to receive?

A. As best I could estimate it, it was the rent at which the property might be rented, or rate at which the property might be rented, over the years that we could see ahead of us.

Q. In that connection, of course, you consider that this property, being vested in the City, is a matter of a permanent thing, is that right? A. Yes.

Q. And that it would continue to own and receive rents from the property from now on unless some superior authority took it from us, that the Russians took over or we gave it to the British or something? A. Yes.

Q. In arriving at your conclusion, have you borne in mind the constant growth of the city? A. Yes.

(Testimony of Ewart Goodwin)

Q. I mean starting back as far as you and I remember, back say for the last 40 years.

A. Yes. But, of course, in 40 years it wasn't very constant over the full period of time. The area had its ups and downs.

Q. I am talking about the entire community. [736]

A. The entire community of San Diego and National City, and San Diego in particular, has gone ahead and National City has gone ahead particularly since 1940.

Q. And, as we look back in 1900, National City and San Diego were both then nothing whatever in comparison to what they are now? A. That is right.

Q. And did you consider the probability that a certain amount of growth would continue? A. Yes; I did.

Q. And you have stated, of course, that the available tidelands in 1942 were pretty well occupied?

A. Yes; those that were directly available for use.

Q. Would you expect, then, Mr. Goodwin, that, as the years went along, the City of National City, if it retained its tideland, would be in position from time to time to receive gradually increasing rent for this property?

A. I would say they might but, on the other hand, there was no question in my mind—or, when you get your rent to a certain point, there were considerable lands that would come in, that would compete with those lands. It is one thing not to bring in any additional land when you have a three-months' rental but, when your rent goes up you can do a lot of dredging and filling and bringing in of new lands, and over a period of years they might bring

## (Testimony of Ewart Goodwin)

in lands in an area that might [737] not be as favorable to industry as they were before. There were some two miles below this area that would very definitely have come in and, in reaching my conclusion as to a fair rental, it is also quite possible that, as a result of a lot of the war activity, we were engaging in a period of profits and return and return that would not, necessarily, be sustained on the same level, over a period of 10, 15 or 20 years. To bring that to a head and interpret it in terms of value, we have only to consider the factor as that the value of recapturing this land was worth \$77,000 eighteen years from now. The present value of the recaptured land is only about 35 per cent of the value that it would have if it was immediately in pocket.

Q. How long from now are you talking about?

A. In that particular instance, 18 years.

Q. Well, of course, in dealing with the City, unless disturbed, it is a matter of hundreds and many hundreds of years?

A. Yes. But you have an increased factor so that you have got what you consider a reasonable rental value.

Q. And they capitalize that at 7 per cent—

A. Among other things.

Q. —for the whole area, is that right?

A. Yes; that is one of the tests and that is the test that I consider one of the most accurate. [738]

Q. That is the way that you arrive at the \$310,475, is by taking what you consider the reasonable rental value of the property and capitalizing it at 7 per cent?

A. That is one of the tests but it isn't the only test.



(Testimony of Ewart Goodwin)

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(Testimony of Ewart Goodwin)

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Q. That is the way that you arrive at the \$310,475, is by taking what you consider the reasonable rental value of the property and capitalizing it at 7 per cent?

A. That is one of the tests but it isn't the only test.

(Testimony of Ewart Goodwin)

Q. That is how you got that particular figure, is it not?

A. It would come close to that; yes.

Q. So that in arriving at that figure, or taking it from that approach, you figure that that is the amount of money which, invested at 7 per cent, would produce that reasonable rental value?

A. It would approximate that; yes.

Q. And what would you recommend, Mr. Goodwin, that the City invest that money in to produce the 7 per cent of safe income?

A. There is no direct investment that they could make in the securities of other concerns or in bonds that would produce that. The City of National City has many things that it could use funds for, including bringing in of additional tideland areas, that would bring it still more income and bring more capital to the community. There are many things, recreation areas, that could be developed and make it a nicer place to live and bring more people there and have them build nicer homes, on which they could levy taxes. It [739] must also be considered, of course, that 7 per cent as expressed in a matter of this sort is not a pure interest rate. There is a possibility, as of 1942, and a good probability, that all of this land would not come into use for some years. The war had been on at that time. The government had been making acquisitions of land and there were still areas in National City, including part of the subject land, on which they were getting absolutely no income. There is a further factor, that the City can't get that income without taking on additional re-

(Testimony of Ewart Goodwin)

sponsibilities that cost them a lot of money, such as I have mentioned, the fire protection, police protection, the establishing of a harbor department and including in the city government salaried business men that are experienced, qualified and competent, to supervise the area and negotiate with prospective purchasers and renegotiate leases and the like. So it isn't a pure interest rate of calculation of a reinvestment setup.

Q. The answer as summed up, then, is that there isn't anything that you have in mind that they could invest in at 7 per cent?

A. Yes; if they brought in additional tidelands, and they got a return on a commensurate amount of money expended—they are in a beautiful position to do it because they just add the proposed dredging or the dredging that was accomplished or in process of being accomplished, down to the ex- [740] tension of Parcel 7.

Q. When you use 7 per cent, there isn't any rule or law that says you must use 7 per cent, is there?

A. No, sir; there isn't.

Q. And you use that because that is what you conclude is, in your opinion, fair as applied to this particular case?

A. Yes, sir.

Q. If, as a matter of fact, you used, for example, 3½ per cent and capitalized at that per cent, it would just double the figure, would it not?

A. Yes; but that wouldn't be justified in considering the cost—



(Testimony of Ewart Goodwin)

Q. If we capitalize it at  $3\frac{1}{2}$  per cent, then the amount required to produce what you call a fair rental income would be \$620,900, would it not? Is that correct?

A. Yes. But, in my opinion, you would just be kidding yourself. A review of the expenses that the City of San Diego is up against and the cost in maintaining their harbor department and dividing it just wouldn't warrant an interest rate of that amount or a capitalization of that amount.

Q. What you have actually done, then, in arriving at this opinion is to take it as though what the City had was the right to collect the rent? You have then taken what you consider a fair rent and you have capitalized that?

A. Yes, sir; that is one of the things I did. [741]

Q. Now, let's suppose, for the sake of the question, that, in addition to that, the City had the actual fee and that could be sold to any party for any purpose. Would that give an additional value to your figures or not?

A. No; I don't think it would.

Q. What I am getting at, Mr. Goodwin, is let's suppose, for the sake of the argument, that this piece of land between the high tideline and extending out into the water to the pierhead line was owned by a private owner, and he came to you and asked you to find him a purchaser, a purchaser that he could convey the fee and sell it for any purpose and use it for any purpose. What do you think you could get for it?

A. I would say it would be a similar amount.

Q. You wouldn't give any added value to that?

A. Do you mean because he was a private owner?

(Testimony of Ewart Goodwin)

Q. Because he was getting the entire fee title.

A. No. That is what would be contemplated in either event.

Q. That is what you would contemplate, then?

A. That is what would be contemplated, in my opinion.

Q. Let's back up a minute. I think you said you were detracting somewhat from the value because the San Francisco Bridge Company lease cut the property up.

A. Yes.

Q. Were you considering that the sale that you were [742] going to make was made of the parcel without the San Francisco Bridge Company parcel?

A. No. The sale that would be made would be of the entire area that we are considering here, subject to the same prior commitments or responsibilities that would have to be carried out by the prospective purchaser, that had been assumed by the owner in the first instance.

Q. You understand, do you not, Mr. Goodwin, that in this particular proceeding the United States Government is taking the entire parcel, its entire title?

A. Yes.

Q. And they take the interest of the San Francisco Bridge Company and the City of National City and of the State of California, and, if anybody else has got any lease on any part of it, no matter what those interests are, they are being taken, is that correct?

A. Yes, sir.

Q. Then, they get the entire parcel in fee and no lease divides anything up at all, does it?

A. Not after they condemn it; no.

(Testimony of Ewart Goodwin)

Q. That is what they get and that is what they should be paid for, is that not correct?

A. No. They are entitled to the highest price, in terms of money, that any other well-informed buyer would pay for the same parcel of property. [743]

Q. Let's assume, then, that any well-informed buyer is buying this piece of land and that the sale is being made and joined in by everybody who has got any interest in it whatsoever. A. Yes.

Q. You wouldn't allow anything or decrease it any because of the existence of a lease, under those circumstances, would you?

A. Yes; it affects the value of the property, that is, the lease existing, the value of the entire property in so much as it interferes with its use as a whole at this time.

Q. Even though the entire property and the entire interest is being sold to the purchaser?

A. Well, it is still subject to the conditions that exist on the property at the time.

Q. You persist, Mr. Goodwin, in assuming that the property is being sold subject to a lease, do you not?

A. No—well—no, not that it is being sold in this particular instance subject to a lease, but in arriving at the opinion of fair market value we must consider the leases that exist on the property. Now, the fact, as I would view it that there is a lease on Parcel 7 that is disposed of and out of the way is the reason that the San Francisco Bridge Company, you might say, in fairness and equity, comes in for the amount that they do. [744]

(Testimony of Ewart Goodwin)

Q. Then, I may fairly assume, may I not, that in arriving at your valuation of the entire tract you give less value to the entire tract because of the existence of the San Francisco Bridge Company lease? A. Yes.

The Court: We will take our recess now, ladies and gentlemen, for a few minutes. Remember the admonition heretofore given you.

(Short recess.) [745]

The Court: I think you may proceed, Mr. Monroe.

Mr. Monroe: Tha is all.

The Court: Now, Mr. Muir, you are going to cross-examine on behalf of the Johnsons as to parcel 9?

Mr. Muir: Yes, I would like to, your Honor.

### Cross-Examination

By Mr. Muir:

Q. Can you tell us, Mr. Goodwin when you were first retained to make an appraisal of all of this property?

A. That matter was first discussed with me in January of 1942. So far as being officially contacted with, to do the job, it was in the spring of '43.

Q. Were you involved in the setting of the figures for the amounts of estimate made in connection with the declaration of taking?

A. That I don't know.

The Court: You will have to raise your voice now, Mr. Goodwin, and also Mr. Muir. I see there is some action in the air that is creating noise.



(Testimony of Ewart Goodwin)

The Witness: I don't know whether the figures I had anything to do with were used in the original statement of taking or not.

Q. By Mr. Muir: Now, in arriving at your opinion of the values you have given us today, you talked with numerous persons; is that correct? [746]

A. Yes.

Q. Are the values you give us now the same as those you gave or had in 1942 and '43?

A. Yes, they are.

Q. Did you consider in making or giving your opinion today of the various values of these properties any of the factors that occurred or facts which occurred subsequent to 1942?

A. No, I could only consider in November, 1942, at the time I was making my appraisals, those factors which I found were in motion that would result in trends or effects and that would affect my opinion of value.

Q. Well, you referred to certain sales and you gave us two; one in April, 1942 and one occurring in October, 1942.

A. I considered all the sales with which I was cognizant. We searched the records. I considered all the sales and listings we had in our files and then we searched the records for data relative to other sales, and all those I could find we considered.

(Testimony of Ewart Goodwin)

Q. You used the records in your own office, your own business office?

A. Yes. Then we also had a check through title company records as to certain sales and considered those that we felt were comparable. [747]

Q. In other words, you didn't check all sales for the area or of property in that vicinity which would comparable?

A. We checked all that we could find. Sometimes there are properties sold under contract of sale where title is not brought down until a later date, and it is not possible—

Q. Did you consider a sale for \$49,000—

Mr. Landrum: Just a moment. If the court please, that is objected to, first, upon the ground and for the reason that there is no showing that it is comparable property, and it is indefinite as to time. I feel if the witness knows the sale, he can cross-examine, but to ask the question and to state the figure at this time I think is improper.

The Court: He did not get a chance to state anything. He hasn't stated the other factors which perhaps are more informative than the price.

Mr. Muir: That is what I had in mind to state.

The Court: State all the facts and the time.

Q. By Mr. Muir: Mr. Goodwin, did you take into consideration in making up your opinion here of the value of these properties a sale which occurred on March 2, 1942 for a consideration of \$49,000; the seller, the San Diego and Arizona Eastern Railway Company; the buyer, San Diego Gas & Electric Company; covering the prop-

(Testimony of Ewart Goodwin)

erty known as Newton Street west of 16th Street, north of the San Diego and Arizona Eastern Railroad Company and the tidelands, and east [748] of waterway, 42 feet open drain. Did you consider that sale?

A. Yes, I did.

Q. How much property was involved in that sale?

A. Will you give me the legal again?

Q. All I have is Newton Street west of 16th Street, north of the San Diego and Arizona Railroad tracks.

A. That is all the information you have on it?

Q. And the date of sale is March 2, 1942, and the improvements are none.

A. Let me see. Newton Street,—west of Newton?

Q. West of 16th Street.

A. Yes, I considered that sale. That was in the—

Q. I asked you what the area was?

A. The area was five and three-quarter acres.

Q. And the price was \$49,000?

A. Yes. I might also state that was in the downtown area of San Diego, and that the purchaser received as a further consideration for the purchase price a lease on a portion of land adjoining the purchase, of which I have a diagram.

Q. Perhaps we have the same ones here. That is shown as your No. 1 sale?

A. No, I think that is shown—

Q. Referring to your index? [749]

A. —as 4-A.

(Testimony of Ewart Goodwin)

Q. In other words, in your remarks you made the same remark as I have, that the purchaser also received—

A. Well, that is logical.

Q. Now, do you have a sale listed as No. 3, at a price of \$3,600, being the southwesterly side of Main Street between Sigsbee and Beardsley, and the legal being Lots 35 to 39, Block 84, Manassee and Shiller Subdivision, plus a part of railway right-of-way?

A. Who were the buyers and sellers?

Q. The seller was the San Diego and Arizona Eastern Railway and the buyer was the Crowe Transport Company.

A. Yes. That was in San Diego, situated on Main Street, which is between Sigsbee and Beardsley, on the westerly side of Main.

Q. Did the area in that instance amount to .45 of an acre?

A. Yes; 20,000 square feet in that parcel.

Q. And the price was \$3,600? A. Yes.

Q. Or figured out at \$7,841 per acre cost,—correct?

A. I assume that is the way it would be extended.

Q. Eighteen cents per square foot and 20,000 square feet?

A. I know that property is not comparable to the [750] property under consideration.

Q. It is not? A. No.

Q. Why?

A. Well, it was on a paved street close to the downtown part of San Diego, and an area that was—had a comparatively small amount of vacant land available for



(Testimony of Ewart Goodwin)

purchase, not similar to an area in an industrial part of National City where four-fifths of the industrial land was unimproved.

Q. Well, it was situated near the industrial area in San Diego? In fact, it was right in the industrial area?

A. Yes, it was what you might call in the industrial area, although it was a wholesale-retail area. The people that are interested in buying there were wholesalers serving the San Diego district, that wanted to be close to the people they had to supply by truck every day, and under those conditions it was necessary to pay a higher price or a premium to be right close to the downtown district.

Q. Well, these parcels are near the National City downtown district?

A. Yes, but without anywhere near the same demand and potential. It was also on the main road to National City and the entire South Bay district. There are certain advertising advantages to the particular location.

Q. You mentioned that one of the advantages of the [751] San Diego property referred to was the fact that it bordered on a paved street, and I understood you to say that there was quite a bit of value to property that bordered on the water, tideland property. That property of Mr. Johnson's was right adjacent to the tidelands, was it not?

A. Yes, it was near the tidelands property.

Q. In fact, he had a pipeline that ran across the tracks and out into the harbor, an oil pipeline that ran into his property? That is of quite some value, isn't it?

A. It certainly is a consideration in the value of it.

(Testimony of Ewart Goodwin)

Q. In other words, if Mr. Johnson had put this property to use for a bulk plant for the distribution of gasoline products, that pipeline, if he wanted to bring the oil or gasoline in by boat, would have been of quite some value, wouldn't it?       A. When?

Q. Back in 1942.

A. Well, not as a final and conclusive factor because that was no location for that type of business in 1942.

Q. Why? Why not?

A. Because of the dust and the unfavorable conditions immediately surrounding it, for that particular use.

Q. You mean dust created by the Tavares Construction Company in the operation of the concrete shipyards? [752]

A. That, and the area adjoining it, and this area where the batch plant was.

Q. I would like for you to consider the property without any shipyard being there at all. In other words, are you considering, Mr. Goodwin, Mr. Johnson's property being of less value because the shipyard went in there and there was a lot of cement dust?

A. No, there were advantages and disadvantages. They weren't all advantages.

Q. In other words, you just mentioned it detracted from the value of his property because of the fact there was a cement plant there?

A. For the particular purpose that you mentioned.

(Testimony of Ewart Goodwin)

Q. Are there any other purposes of use that the cement plant would have detracted from

A. Other uses where the existence of dust and the like would be objectionable, yes.

Q. Well, at the time Mr. Johnson's title was taken, on November 10, 1942, there wasn't any plant on his land that created dust, was there

A. Not on his property, no, but I am quite sure there was there.

Q. Well, in 1942 it wasn't on his property?

A. I am not positive as to the exact location at that particular time. [753]

Q. Well, give us approximately where you think it was.

A. I don't—I am not sure that the batching plant was then in operation, at that particular time. There were heavy construction operations going on and lots of dust flying, and the—

Q. You don't mean to imply possibly all these structures were put on the property before they even took the title or started to condemn?

A. I don't know. That is quite possible.

Q. In other words, the government just moved in and took possession, and later on filed a condemnation suit?

A. No, they often did that under a use permit obtained from the owners.

Q. You don't know of any use permit in this case, involving any of these properties, do you?

A. No, I don't.

(Testimony of Ewart Goodwin)

Q. In other words, to summarize this, this property referred to here of .45 of an acre in the wholesale business district, the wholesale industrial section of San Diego, is not comparable to the industrial area in National City?

A. I would say it isn't at all comparable as to value.

Q. That is just your declared opinion?

A. Yes, it is based on an analysis of sales and listings throughout the entire area. It is more comparable to the value of property south of 32nd Street in San Diego, although [754] even the properties in National City were not bringing as high a value as they were in the City of San Diego, as high a price.

Q. Each property referred to had a railroad track running alongside of it; is that correct?

A. Yes, I believe that's correct.

Q. So they were similar in that regard?

A. That's correct.

Q. Would you say that the southwesterly side of Main Street between Beardsley and Crosley was somewhat comparable to Mr. Johnson's property?

A. No, I would not.

Q. Why not? It is getting down pretty close there, is it not?

A. No, that is just a half block closer than the property you mentioned previously.

Q. How many miles away is that from parcel 9?

A. Oh, I would estimate that is about three to three and a half miles from parcel 9.



(Testimony of Ewart Goodwin)

Q. Well, in arriving at your valuation here, you referred to property a couple of miles or three miles away, didn't you?

A. No, the property to which I particularly referred—

Q. I am talking about those tideland leases. They were as much as five, six and eight miles away, weren't they? [755]

A. That was by way of comparing the areas on the tidelands and with immediate access to the water.

Q. Well, you wouldn't say that three miles from a designated point, both points being in an industrial area, is so disrelated that the values could not be compared?

A. Yes, because industrial lands are often sold for various purposes. The San Diego Consolidated Gas & Electric Company, for example, bought the parcel to which you referred, in my opinion, for a special use, and they needed property in a certain location.

Q. Well, now, if I may interrupt you at that point: the United States government, in a way of speaking, is buying this property for a designated purpose, and, therefore, that would be of considerable value, too?

Mr. Landrum: Just a moment. If the court please, that is objected to on the ground it is incompetent and immaterial what the government was buying it for.

The Court: Yes. It is not the enhancement to the government or its peculiar value to the condemnor. It is the loss to the property owner of the property taken that is the basis for the valuation.

(Testimony of Ewart Goodwin)

Q. By Mr. Muir: How many square feet are there in this property of Mr. Johnson's and his wife?

A. There was 1.2 acres. That would be about 44 or 45 thousand square feet. [756]

Q. Did you take into consideration in arriving at your opinion of value the improvements upon the property?

A. Yes, I did.

Q. What improvements were those?

A. The improvements on the property consisted of a small building that would be suitable for a field office, tool building, storage shed; a 15 by 30 foot corrugated sheath on a slab floor.

Q. Well, what do you think that building was worth?

A. Well, I believed that the existence of the building on the property would have enhanced the value of the property over what it would otherwise have been by \$250.

Q. In this particular instance though it might have been a detriment to the buyers, in that they might have had to remove the building, and did you take that into consideration?

A. I considered the fact that the building was there and the extent to which, in my opinion, it enhanced the value of the property.

Q. I want to direct your attention to Plaintiff's Exhibit 1, parcel 9, being a sort of a square with a neck extending down to the south, and which I think was referred to here as a ramp. Would you say that the fact that the government took that portion of the ramp through the south half of Mr. Johnson's property detracted from what remained [757] in the Johnsons, that is, the prop-

(Testimony of Ewart Goodwin)

erty here which is shown immediately to the south of parcel 9?

A. No, I don't believe that it detracted.

Q. So you know, as a matter of fact, the ramp divided up the property that remained in the Johnsons?

A. Yes.

Q. It didn't detract from that property, though?

A. No. In my opinion, it was much the same as though an alley had existed on the property and the remainder was still susceptible of use.

Q. In the case of an alley, it is dedicated to public use. This is a ramp on private property, exclusively for the use of the United States, and that would not give any use in the Johnsons in using the property that was so divided, would it?

A. It wouldn't, but the bulk of sales in National City were of property similar to the property that remained, and it was not carved out in any disproportionate manner by the existence of the finger that extended out. [758]

Q. By Mr. Muir: How far away from Parcel 9 was this property in National City that you referred to?

A. There were various smaller parcels, in National City, 50 by 125, 65 by 125 or 115.

Q. Where were they located, Mr. Goodwin?

A. In various areas both north and south of the subject property.

Q. Were they adjacent to the tidelands?

A. Not immediately adjacent to the tidelands.

Q. How far back were they?

A. Oh, three or four hundred feet.

(Testimony of Ewart Goodwin)

Q. They were not in the immediate vicinity at all, in other words?

A. Well, within two or three blocks.

Q. Would you say to the east?

A. South and east and some to the north.

Q. To the south there isn't very much more property that borders on the tidelands privately-owned, is there?

A. No.

Q. Then, it must have been to the east; not to the south?

A. No. There is additional property that borders on tidelands, just as the parcel immediately to the north did.

Q. But to the south there is nothing, is there?

A. Yes. [759]

Q. Perhaps one block and that is all?

A. No. there are, speaking from memory, I would say several hundred acres.

Q. Tidelands property?

A. No; not all tidelands; adjacent to the tidelands. I believe that the Santa Fe Railroad has at lease several hundred acres in that category.

Q. You said that you considered a sale by the Santa Fe in arriving at your opinion as to what you should say here as to the value of Mr. and Mrs. Johnson's property. Was that the property that was condemned by the United States in this proceeding, in which they sold to the government after the institution of these proceedings?

A. No; I didn't say that I considered any sale of the Santa Fe, I don't believe.



(Testimony of Ewart Goodwin)

Q. I noted, Mr. Goodwin, that you indicated four factors in arriving at your opinion, sales of other property, the large amount of other vacant property in National City, Santa Fe sale of property and lease with Tavares.

A. No; I think I said the Santa Fe listing.

Q. Was that a listing in your office? Do you mean a real estate listing?     A. Yes, sir.

Q. That was furnished to you by the Santa Fe?

A. That is right, at my request, in connecton with [760] other work we had done for the Santa Fe, but not for the Santa Fe of other work we had done in condemnation proceedings.

Q. You mentioned that you considered the lease with Tavares, that was made by Mr. and Mrs. Johnson, in arriving at your opinion? Did I understand you correctly?

A. Yes.

Q. And you understood in so considering it that it was a lease at the rate of \$40 a month, to run for five years, with an option to renew it for another five years?

A. That is right.

Q. The rental on this lease for the term of five years was \$4,125, is that correct?     A. No.

Q. How much was the total?

A. I would have to multiply it out for five years.

Q. \$480 a year?

A. Well, say, if it was \$500 for five years, it would be \$2500. It would be somewhat less than \$2500.

Q. In making an analogy between the National City property and the San Francisco Bridge Company lease,

(Testimony of Ewart Goodwin)

I would assume you would say about the Johnson property that the lease with Tavares was a detriment to the Johnsons in having this lease with Tavares at the time of taking? In other words, in arriving at the value you would give the Johnsons for their property, you would take this Tavares lease value? [761]           A. No.

Q. You would not?           A. No.

Q. Did you consider in arriving at your opinion that the Johnsons suffered a detriment in losing the rental under the Tavares lease of \$40 a month for five years?

A. Yes.

Q. That would be a detriment of about how much?

Mr. Landrum: Just a moment, if the court please. That is objected to as incompetent. The question of fair market value does not include any loss of lease. That question was before your Honor, as you recall.

The Court: The way the question is framed, it includes a factor that he took into consideration. The government took the fee and took everything, including the income and the possibility of potentialities. The objection is overruled.

The Witness: Will you repeat the question again?

(Question read by reporter.)

The Witness: I did not attempt to figure it as to an exact amount of detriment that they had suffered.

Q. By Mr. Muir: In reference to your testimony about National City's fee title and the San Francisco

(Testimony of Ewart Goodwin)

Bridge Company lease, you figured that accurately to the dollar, as I understood your testimony?

A. That was, in my opinion, an entirely different situ- [762] ation; that they had created certain items of value as a result of their effort. They had obtained a favorable lease. I can't understand why one would have paid \$40 a month for this particular parcel of property.

Q. May I ask you if you were one of the government appraisers that set the value of the property and fixed a rental therefor in connection with the making of the Tavares lease with the Johnsons? A. No.

Q. You were not? A. No.

Q. Are you familiar with the government's practice of capitalizing the property in arriving at the rental to be paid?

A. Yes; I believe I know what you mean. I am familiar with the process that is followed. Do you mean when it comes to going out and appraising a given parcel of land and placing on the parcel of land the value—placing the value of the parcel or the fee and then placing the amount of rent that you feel is the fair rental value?

Q. If you use your theory of 7 per cent in arriving at a capitalization value in regard to the Johnson's property and a rate of \$40 a month rental, it would have to be 15 or 16 per cent return to arrive at the true value, wouldn't it? Would that be about right? [763]

A. Yes; if you used that same procedure, or the properties and the conditions are not favorable. On the one hand, we have a favorable lease, but, on the other hand, we have, in my opinion, an amount of money here which

(Testimony of Ewart Goodwin)

was quite high or excessive. There is nothing else like it. The parcel immediately to the north is rented for much less money to the same people.

Q. May I ask if you took into consideration in arriving at your opinion the lease between the Johnsons and Carl Bliss that was made out at \$100 a month for this property and it was paid for two months prior to the execution of the Tavares lease on June 5, 1942?

A. Yes; I knew of that lease but that lease was not in effect at the time or on the date of our valuation and there were, as I understand it, certain other matters involved, certain other improvements on an additional portion of property. They covered not only this property but certain additional property.

Q. I understood you to say you considered it?

A. Yes.

Q. And you considered the fact that the Johnsons were getting \$100 a month rent from Carl Bliss? You considered that fact in arriving at your opinion?

A. Yes; for this and other property.

Q. And you also considered the lease which was later entered into between Carl Bliss and the Johnstons about that [764] same time as the Tavares? In other words, Mr. Bliss relinquished his previous lease and Tavares and Bliss took separate leases of separate portions, about June, 1942? You were familiar with that, too?

A. Yes.

Q. You were familiar with the fact that Mr. and Mrs. Johnson were getting \$35 a month rent on the Bliss land at the time they got \$40 a month from the Tavares people?

A. Yes.



(Testimony of Ewart Goodwin)

Q. You considered those factors?

A. Yes, sir.

Q. And you considered that property bringing in \$75 a month on fixed leases for a definite period of at least five years, and possibly 10,—that \$75 a month was worth just \$2500, is that your opinion?

A. No; that is not my opinion. And that wasn't the condition, either.

Q. In other words, property worth \$2500 in this instance was bringing in \$75 a month income?

A. No, that involved additional property.

Q. What additional area to the south of the subject property when you say additional area?

A. I believe it was about 60 or 70 per cent of an acre, 7/10 of an acre say, or 6/10 of an acre. [765]

Q. Is that any of the property that Mr. Haas bought from the Johnsons?

A. Yes. But that included on it at that time an office, a storage building and a garage building.

Q. By the way, I noted in your testimony that you stated that in regard to one of these other pieces of property that had been sold, that is, a sale, you considered in arriving at your opinion of the Johnsons' value part of this other property was marsh land, is that correct?

A. Yes; one-quarter of it.

Q. Was that property that the sewer was emptying into from other adjoining properties?     A. No.

Q. Was that property owned by the Santa Fe Railway?

A. No. That property had been owned by George Johnson of National City.

(Testimony of Ewart Goodwin)

Q. That is the portion that had the marsh land on it, is that right?

A. Yes; that marsh land and also some very good land.

Q. In other words, the good land was solid earth like the Johnson's property?

A. Yes.

Q. I presume you also considered in arriving at your opinion this sale by Johnson to Haas for \$7,000? You considered that? [766]

A. No; that sale had not been made at the time of my appraisal.

Q. In giving your opinion now at this time, you are cognizant of that fact, are you not, that the Haas people bought from the Johnsons this property to the south, divided by the ramp, for \$7,000 cash?

A. Including the improvements thereon, which consisted of an office, a storage building and a garage building.

Q. Was that any of the property you described as being on Parcel 9 when I asked you once before?

A. No. This was on the other property. There was also a small structure on that Parcel 9.

Q. Were those improvements quite as valuable as compared to the \$250 of improvements on Parcel 9?

A. Yes.

Q. What were they worth?

A. I don't recall the exact detail of the improvements to the extent that I think it would be fair to give an opinion as to their value. I would say in excess, however, of \$2,000.

Q. If you would say \$2,000, you must know what kind of a building you are talking about.

(Testimony of Ewart Goodwin)

A. Yes, but there is a lot of difference in saying in excess of \$2,000 and figuring out a quantitative analysis of [767] the building.

Q. You having now fixed a value of \$2,000—

A. I haven't fixed that value.

Q. —or in excess thereof, for the buildings on the property of the Haas', please describe those buildings?

Mr. Landrum: As I understand it, the sale which counsel refers to took place subsequent to November 10, 1942. It would have been impossible for a buyer to know what that sale would be, and we object to it.

Mr. Muir: I think this is proper upon cross examination as going to the truth and veracity of the witness and his extent of memory.

The Court: It seems to me this is an immaterial matter. If we are restricted, as we are, to a certain date for the purpose of ascertaining the value of the property, I think it would be immaterial as to what an appraiser or an evaluator may think as to sales made subsequent. If sales were made subsequent, they couldn't be within the mind of the evaluator unless an investigation were proceeding at the time that involved the details of this property. The objection is sustained. Mr. Muir, if this is going to take some little time, we will take a recess now.

Mr. Muir: I will have a few more questions.

The Court: We will take a recess now until 2:00 o'clock, ladies and gentlemen of the jury. Remember the [768] admonition heretofore given you and keep its terms inviolate.

(Thereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p. m.) [769]

San Diego, California, Monday, February 24, 1947.

2:00 P. M.

The Court: All present. Proceed.

EWART GOODWIN,

called as a witness by and on behalf of the plaintiff, having been previously sworn, resumed the stand and testified further as follows:

Cross Examination (Continued)

By Mr. Muir:

Q. Mr. Goodwin, in regard to evaluation of property, when there is a leasehold interest outstanding, that is, an owner has leased the property to somebody, did I understand you to say that in computing the value of the fee you would take into consideration the value of such outstanding lease? A. Yes.

Q. That is, when an owner gives a lease, he gives away the profits of the land for the term of the lease?

A. Yes, in fact, he does.

Q. That was your testimony this morning, also, was it not? A. Yes, sir.

Q. So that, in other words, in the case of the Johnsons, when they entered into these leases with Bliss and Tavares, they had a total rental of approximately \$4,100 coming in, and by your statement they gave away, when they executed [770] those leases, they gave away the profits for that period, amounting to that amount of money; is that right? A. No.

Q. They did not?

A. We were concerned there with a lease that had a little less than five years to go, bringing in \$40 a month. That was a higher rental than any other rentals I knew of



(Testimony of Ewart Goodwin)

in the same area of comparable property, of which there was an adequate supply, and that would not equal the amount you mentioned.

Q. But doesn't our definition and the operation of your opinion work in all cases, or is this just an exception?

A. Here we are valuing the property for the leasehold and for the period that Tavares had obligated themselves to continue paying rent at the same basis it had a period of a little less than five years to run.

Q. Just confining ourselves to the Johnsons' lease with Tavares, then you would say that during the time of the Tavares lease, which was a little less than five years, the Johnsons for that period had given away the profits of their land, for that period?

A. That is correct. The rate that they were getting was, however, in my opinion a substantial one. It was paid to them based on a particular need, apparently, of a concern for this particular piece of property, and is not, in my [771] opinion, a proper gauge of the fair market value of property, as the definition applies in California.

Q. Then this land of the Johnsons was particularly valuable by reason of the fact that it was so located, then?

A. It happened to have a particular use for the Tavares Construction Company, that is correct, but that does not mean, I don't believe, that we must give consideration in valuing this property to a lease on a given piece of property that is out of proportion to leases paid for other similar pieces of property. [772]

Q. By Mr. Muir: Leaving out of the matter the argument on the amount of the rental, nevertheless, you would say, would you not, that, when the Johnsons made

(Testimony of Ewart Goodwin)

their lease with Tavares, they lost the profits for the term of that lease?

Mr. Landrum: Just a moment. If the court please, I am going to have to object to that as immaterial. We are taking fee title here.

The Court: He is trying to arrive at factors which, according to counsel's hypothesis, should enter into the market value of the property at the time it was taken. He and the witness haven't been able to agree upon those factors. Overruled.

The Witness: What is the question?

The Court: Read it.

(Question read by reporter.)

The Witness: I question if that is what counsel meant to ask, "when they made the lease with Tavares that they lost their profits of the lease."

Q. By Mr. Muir: From the land.

A. When they made the lease with Tavares?

Q. Yes.

A. They gave up the land and the use of the land to the Tavares Construction Company but, when they made the lease to Tavares, I don't see where it would follow at that [773] point they lost the profits from the land. They transferred the possibility of making a profit on the land from themselves to Tavares.

Q. I would like to ask you what percentage in this capitalization you would use in respect to just the Johnsons' property. You spoke about 7 per cent as being about right for the City of National City in arriving at your evaluation, and I asked you if 7 per cent fit the

(Testimony of Ewart Goodwin)

Johnsons' and you said that was entirely different. Now, what percentage do you place on it?

A. In the first place, it was entirely different because it was an isolated example of a rental being paid that wasn't comparable to any other rentals. As far as—I forget the last part of your question.

The Court: Read it.

(Latter part of question read by reporter.)

The Witness: I did not place an exact percentage on it. It would actually be much higher than 7 per cent because, when anyone is receiving a return out of proportion to other returns, it is always subject to risk of the lessee taking advantage of any circumstance that would come up to get himself in more favorable position when he is paying above the market for a given piece of property. And you would figure in any interest rate, there being two primary items that make up an interest rate, one, the service charge [774] for the use of the money and the other the risk involved, there is greater risk in the return on your capital when you are getting a return that is disproportionate to the return of other people and, therefore, what was a much higher rate of interest.

Q. By Mr. Muir: Then, if Mr. Tavares had agreed to pay \$200 a month rental, the risk to the Johnsons would have been increased proportionately and the value of their lease would have gone down proportionately?

A. No. The rate at which you would capitalize it, if the rental is in line with other rentals being paid, is much more conservative or much lower than if you are getting a rental that is out of proportion with rents that are being paid for similar types of properties in the same general area.

(Testimony of Ewart Goodwin)

Q. Well, would you say about 15 per cent would be a fair return on the capitalized value of the Johnson property?

A. A range of 15 to 20 per cent.

Q. That is what he should get back in rental, then, would you say?

A. Yes.

Q. One thing further. You said that you considered in arriving at your opinion of the values of all these parcels of land the labor situation in this area. What has that got to do with the Johnson property?

A. The labor situation, both as to the adequacy of pay [775] of labor, the adequacy of supply of labor, the working conditions under which labor can function, and the degree of efficiency they can use and bring to play in a certain area, has a bearing upon the value of industrial property in that area. In other words, if you have a supply of industrial property and there was no labor to work and produce money from their labors, the value of the property couldn't be very considerable.

Q. If this were used for a bulkhead plant or oil petroleum distribution plant, there wouldn't be very many men employed, or involved, would there?

A. Yes; but the value of the property for a bulkhead plant would depend upon the use of other concerns, wholesalers and manufactureres, in the community, for what would be sold by the bulkhead plant.

Q. What does an oil petroleum plant sell other than gasoline, kerosene and oils?

A. That is all they sell but they sell to people who must be engaged in labor in a given area, who produce the money to buy the gasoline, whether they are working men or anyone else living in that area.



(Testimony of Ewart Goodwin)

Q. Isn't a bulkhead plant usually built up on the amount of gasoline they control in gallonage? That is to say, if a bulkhead plant can distribute three or four hundred thousand gallons per month, the bulkhead plant must be big [776] enough to take care of that, must it not?

A. That is right; yes.

Q. And that would be a mechanized operation, and, except for truck drivers and a few odd personnel, labor wouldn't come into play in that regard for that particular use of this property?

A. No, only to the extent that they were engaged in competition with other people for labor.

Q. It would be a rather limited field?

A. Yes; it is not—

Q. Anybody with a chauffeur's license could get a job as a truck driver?     A. I would assume so; yes.

Q. In arriving at your value, would you say that possibly \$2,000 might be a fair value for the Johnsons' property just as well as \$2500?

A. No; it was not my opinion.

Q. Is your opinion right on the dollar, \$2500, no more and no less?     A. That was my opinion; yes, sir.

Q. It couldn't be \$2501 or \$2499?

A. That wasn't the conclusion I reached.

Q. If you are so precise, then, exactly upon what basis did you compute exactly \$2,500?

A. I computed the value of that property at \$2,500 [777] after considering—did you want to break it down and analyze the other sales?

(Testimony of Ewart Goodwin)

Q. No. Break it down as to what Mr. Johnson and his wife owned that you people put an added figure on of \$2500. What did they have that amounted to that?

A. They had an acre and two one-hundredths of land, with a small storage shed, as I have said, located in the City of National City, and that was comparable to other lands also in the City of National City, that had sold at a price that, in my opinion, was definitely comparable with the value that I have put upon their property.

Q. Across Harrison Street you place a greater value upon that land, don't you, than you do on the Johnsons'? It is more valuable?

A. Do you mean to the west of the Johnson property?

Q. Yes; across the street.

A. No. Directly across the street, on the area that was leased to Tavares, yes. Across the street and down into Parcel 3, as to the rear portion of Parcel 3, no.

Mr. Muir: That is all.

By Mr. Sloane:

Q. If your Honor please, Mr. Goodwin, I want you to deal solely with the San Francisco lease and the lands and areas covered by the San Francisco lease. [778]

I take it that, being an expert appraiser, you are able to visualize and deal with that lease as it existed November 10, 1942?

A. Yes, sir.

Q. Entirely apart from who owned the fee or what would happen to this land in future times? Is that true?

A. Yes.

Q. In other words, as I understand it, the lease and the leasehold rights under it had a definite value in November, 1942?

A. Yes.

(Testimony of Ewart Goodwin)

Q. That may or may not be in an up or down proportion to what the owner of the fee may have had of the lease? A. I don't understand. [779]

Q. What I want to make sure is that you were asked to pick out the lease and forget about these other people. Can we do that?

A. Yes, I think so except that, of course, in that we can't forget the City of National City, so far as being the owner of the fee and the others to whom the property would come at the end.

Q. That is true, but I am talking about the value. It doesn't make any difference, so far as fixing the value is concerned, it doesn't make any difference whether the City of National City owned the fee or whether I owned it? A. That is correct.

Q. Now, going back to 1942, let me make sure that we understand each other. On the basis of your testimony already given, it was your understanding that the City of National City had the right of occupancy of 6.26 acres of what we call shoreland? A. Yes.

Q. And that is the area marked in blue?

A. Yes.

Q. And that they also had rights given to them under the lease in the water area immediately adjoining and filling out the parallelogram? A. Yes.

Q. I take it that in fixing the value of the lease, we [780] are interested, first, in the physical characterization of the ground and the water, of the location relative to other lands, and of the adaptability to different uses, having in mind the highest and best use? A. Yes.

Q. We should also have in mind the terms of the particular lease, as compared to other leases, ordinary leases; is that correct? A. Yes.

(Testimony of Ewart Goodwin)

Mr. Sloane: The National City lease has been received in evidence here and is marked Exhibit L. I wish to examine the witness concerning that. Your Honor, may I have permission to give to the jury copies of that lease?

The Court: Yes, sir.

Mr. Sloane: And in case you don't have one, I will furnish you with a copy.

Q. By Mr. Sloane: Taking up, first, the general characteristics of this particular piece of land, how would you say this parcel 7 compares in lease value, use value, with parcel No. 2, for example, which is the yellow parcel on the plat?

A. I believe it is considerably more valuable than parcel No. 2.

Q. Now, when you are speaking of the value, you mean the rental value? [781] A. Yes.

Q. How would the rental value compare as of that date, in your estimation? Is parcel 7 worth twice as much, three times, or what figure would you place on it?

A. I would say that parcel 7 would be worth probably four times as much.

Q. And what is the reason for that difference in valuation?

A. Because it had direct access to water that was dredged out to a depth that would admit the shallower draft boats, the barges, and the like, and to a certain extent control that much of the water frontage.

Q. With regard to parcel 3, which is the blue area, would that be two, three or four times as much in rental value, referring to parcel 7?

A. Well, it would be, to use round figures, and not having worked it out how many times more, I would say it certainly would be two or three times.



(Testimony of Ewart Goodwin)

Q. Is it fair to say three times?

A. I am not sure that it would be fair to say three; somewhere between two and three times.

Q. Suppose we compromise, in order to have a figure, and say two and a half times?

A. Well, that is up to you. You are asking questions that are a little difficult. [782]

Q. These questions are very general. Now, in regard to a comparison to parcel 1, how would you say that 18 acres in parcel 1, the red portion, compares in rental value with the acreage in parcel 7?

A. Considering the condition of the water area immediately in front of parcel 7, and considering the ratio of the water frontage that is controlled as compared to depth, it would be considerably more valuable than parcel 1.

Q. Can you give us a rough comparative value? Would it be twice as much, or three times?

A. I believe it would be approximately twice as much.

Q. What was the condition of the water area west of parcel 1 in November, 1942?

A. Well, the condition of the water area west of parcel 1 was a varying depth of about two feet above the lower low water to five feet; some places six, seven, nine, ten and up to sixteen; even over twenty feet as it approached the extreme westerly portion of parcel A.

Q. Then the westerly portion of it was the natural depth of the water, where the natural channel existed?

A. Approximately. Possibly not to the same depth as the channel itself.

Q. From there on shoreward it ran up into graduating depths, getting shallower and shallower until it was three

(Testimony of Ewart Goodwin)

or four feet, going to where it is marked as the bulk-head [783] line?           A. Yes, two to four feet.

Q. In other words, to put it into other terms, a boat drawing ten feet at low tide could get in along parcel 7 right along the shore line, but could not get right up to parcel 1?

A. That's right, could not get right up to parcel 1.

Q. Let me see if I made a correct note of the valuation which you gave to the San Francisco leasehold. Is the figure on the total value \$45,750?

A. Yes, sir, as I remember it.

Q. Did I understand you to say that that was the value which you placed on parcel 7, exclusive of any value actually allocated to parcel A?

A. Well, in my method of reaching an opinion as to value, I considered that parcel A was a waterway or right-of-way, just as a street is, and that the area, the upland area, the land area, would reflect the value of the entire parcel.

Q. I understood also that you started your computation of the value to a large extent there by seeking to restore to the San Francisco Bridge Company the money which they had expended or the value which they had contributed to the land prior to November, 1942, that is, the building of the pier and the dredging of the mud in area A? [784]

A. I don't know how you reach that conclusion.

Q. Well, as I understood you, you fix a contribution of value to the property for building the pier of \$12,000.

A. That was my estimate of it.

(Testimony of Ewart Goodwin)

Q. Yes?

And for dredging, \$15,000?

A. That was my estimate of what the area dredged immediately in front of the parcel might have cost at that time.

Q. Now, what effect did you give to those parcels in arriving at your rental value per acre?

A. Well, as they were reflected in my opinion of the valuation of or marketability of parcel No. 7.

Q. In other words, parcel No. 7 with a pier on it would be worth \$12,000 more than parcel No. 7 without it?

A. Well, it would be worth more. Of course, in the final analysis the question was how much would some lessee, the San Francisco Bridge or some other lessee be justified in paying for the entire area of parcel 7.

Q. That is for the use of it, you would say, for a period of 17 or 18 years to follow?             A. Yes.

Q. And your opinion is that they would be justified in figuring in the contributed value of \$12,000 because of the pier being there? [785]

A. Well, I don't know what value specifically a person might take into consideration by reason of the pier being there. The fact that the pier, in my opinion, might have been built at a cost of \$12,000 doesn't necessarily mean that someone else coming along would want to use the same pier just the way it was. It might fit their needs or might have to be considerably altered. The channel might have to be a little deeper, or might be just right.

Q. But for anyone who contemplated a use similar to that that the San Francisco Bridge was making of it, that would save them an investment of \$12,000 to build a pier like that?             A. Yes, sir.

(Testimony of Ewart Goodwin)

Q. Now, with respect to the dredging, I believe you gave us a figure of \$15,000, which I assume you treated in the same manner. Where did you get that figure?

A. I computed what, in my opinion, was the maximum amount of earth or spoil that would have to be removed from the parcel, the parallelogram to which we have referred, to reach a depth of 10 to 11 or 12 feet.

Q. Would it make any difference if the excavations went outside of the boundaries of the San Francisco Bridge lease and carried on westward clear to the deep water?

A. Yes, that would be of additional advantage, yes, sir. [786]

Q. So that any money that was spent in dredging westerly of parcel 7 added to the value of the leasehold, did it?

A. Well, not necessarily any more. You could go down further than necessary or you might put a much wider channel there than was necessary.

Q. I am speaking of any dredging that was actually done prior to 1942, in November.

A. Yes, it would definitely add to the value.

Q. Do you know who did that dredging, actually?

A. Well, I know who paid it. I think, as I recall it, Case Construction did the dredging, but San Francisco Bridge paid for it.

Q. Don't you know that the San Francisco Bridge Company did the dredging itself, with its own equipment?

A. I don't believe they did.

Q. You do know that the Case Company was operating in that vicinity?

A. Yes.



(Testimony of Ewart Goodwin)

Q. Do you know that 163,000 cubic yards of spoil was taken out of the bottom and unloaded in the mole fills in the land to the south of parcel 3?

A. No, I don't know that exactly that quantity was taken out.

Q. Did you have a quantity when you were making your computations? [787]

A. Yes, I did. I had assumed that spoil was taken out of the area, but outside of getting additional spoil to raise the land, I didn't figure where they could get that much spoil or where they would need that much to accomplish the dredging down to the required depth. It wouldn't equal that many cubic yards of spoil.

Q. You are not a dredging engineer, are you?

A. No, sir.

Q. And you would be guided somewhat by the testimony of the man who actually did the dredging, wouldn't you?

A. Certainly, excepting for the point that possibly he might have gone a little bit beyond what was absolutely necessary in polishing it up.

Q. Well, if area A, having reference to the southerly portion, was dredged to a depth of 10 feet, I understood you to say that added to the value of parcel 7?

A. Yes.

Q. And if it were dredged to 12 feet, would that make any difference in whether it was valuable or not?

A. Yes, it would add slightly to the value.

Q. It would be more valuable if it were 12 feet?

A. Yes.

Q. So that if that was the precise amount of cubic yards that was taken out, that was a contribution to the value of that land? [788]

A. Yes.

(Testimony of Ewart Goodwin)

Q. Now, if you made a computation, would you be kind enough to give me the number of cubic yards you did compute in arriving at the \$15,000 cost?

A. I don't believe I have the notation on the computation here, as to the number of yards. The question that was asked when I said that the amount would equal \$15,000 was directed at that time to the parallelogram.

Q. To be perfectly fair with you, I will say that the testimony so far shows there was 163,000 cubic yards taken out by the San Francisco Bridge Company during the month of February, 1941, in area A,—

A. Yes.

Q. —adjacent to parcel 7?

A. Yes.

Q. You don't know whether that was the figure you used in your computations?

A. No, I did not feel—that is not the figure I used. I used a lesser figure.

Q. What rate did you use as the reasonable cost of removing a dredging of that sort at that time?

A. As I recall, the rate at that time was 15 cents a yard.

Q. Do you know what rate was actually paid the Case people for dredging immediately offshore parcel 1? [789]

A. Well, that wasn't dredged, as I recall, at that particular time. I don't believe that I know what Case was paid in that particular instance. I am familiar with what they and others were paid and as to what the going charge had been on a number of contracts that had been let as the channel was dredged coming down the Bay.

Q. Isn't it a fact that the contracts which were actually let in the northerly portion of parcel A at about this same time were, respectively 32 cents a cubic yard and 39 cents a cubic yard?

A. No, I didn't know that.

(Testimony of Ewart Goodwin)

Q. So if you should base your computation on the actual yardage removed and the actual going rate of removal at that time, it would make quite an increase in your figure of \$15,000, would it not?

A. Yes. I believe, to the best of my knowledge, I used the going rate at that time.

Q. Which was 15 cents, you say?

A. Yes. In fact, there were some that had been let for less than that.

Q. Those were for large areas under government contract and involved millions of yards, were they not?

A. Yes, but with a greater distance to the spoil areas than was involved here.

Q. There were many considerations that were different [790] from those immediately in this area?

A. Yes. Well, advantages and disadvantages.

Q. It worked both ways? A. That's right.

Q. I believe you said in your direct testimony that, in your opinion, the rental value of this property in 1942, referring to parcel 7, 6.26 acres, was 2 cents a square foot? A. Yes, sir.

Q. So if that was about four times the rental value of parcel 2, parcel 2 would have a rental value of one-half cent a square foot, if my mathematics is developing properly? A. Yes.

Q. And you attributed no individual value, no segregated value, to the right to use the water area, 8.28 acres, in parcel A? A. No, sir.

Q. I believe you compared that to a street frontage which gives value to the abutting property?

A. Or a right-of-way,—

(Testimony of Ewart Goodwin)

Q. Or a right-of-way?

A. —that is reserved to it, and as comparable with the same privilege that was granted in many of the San Diego Harbor leases that were available for comparison.

Q. Isn't it true that in those San Diego Harbor leases a charge of about one cent a square foot was made in addition [791] to the charge for the land area?

A. No.

Q. Don't you know that those leases provide a figure of so much per month for the water area?

A. There are in some instances wharfage charges made, where that is the case, but that square footage would apply to the wharfage primarily, not the entire—

Q. I didn't say it was a square footage charge, but is it not true that a charge was charged to the tenant on the land for the use of the water immediately in front of his territory?

A. In some cases. There were cases where it was sublet on no charge for the use of the land, or it was so nominal that in considering a comparable piece of property it couldn't be reflected in the property itself.

Q. Did you find the land rental rate in these areas which you have marked on Plaintiff's Exhibit No. 6 the rate in effect in 1942, in November, ran about two to three cents a square foot?

A. No, definitely not.

Q. Did you find them to be more or less?

A. Less.

Q. Can you name, or do you have a list of the rentals? Referring now to the area which you have marked with the letter U on the exhibit, am I right in identifying that as [792] the Campbell Machine Company? No, that must be No. "X." That "X" is the Campbell Machine Company lease.

A. "U" or "X"?



(Testimony of Ewart Goodwin)

Q. I think it is "X." I will have to ask you the question. A. "U" was National Machine Works.

Q. And "X" was Campbell Machine, as I remember it.

A. And that lease was a lease entered into on April 1, 1941. Do you want the rent paid?

Q. Yes. Give me the rate for the first five years.

A. One cent per square foot.

Q. And the second five years?

A. The next ten years was at one and one-half cents per square foot, and the last ten years would be at two cents a square foot.

Q. Now, how much rental did they pay for their water area fronting on that property, according to the lease?

A. In the case of the National Iron Works—

Q. I am speaking of the Campbell Machine Company, No. "X."

A. Let me see. The Campbell Machine Company had a \$25 per month additional amount for the portion that was water area.

Q. Do you know how many acres were in that water area? [793]

A. No, except that in their instance that the water area which, of course, included, as I recall it, some wharves also figured out at about three cents a square foot.

Q. Three cents a square foot? A. Yes, sir.

Q. Now, going down to the Sun Harbor, which I believe you have identified with the letter P, can you tell me on what basis they were paying for the water which fronted on their shoreland?

A. Well, they didn't pay anything for the water. They paid \$25 a month for the wharf that was there.

(Testimony of Ewart Goodwin)

Q. Well, the right to use the water for a wharf?

A. Yes, but they also have the right to come and go and a permissive use of the area fronting it that is considerably more than the wharf itself.

Q. That right is common to the adjacent owners, is it not, that the people on each side could go and come through that same water?

A. No, not necessarily. The Harbor Department was interested in giving a more or less exclusive use to those areas, so they would not have to police it themselves, that they would let the fellow to whom they loaned it tell the other fellows to keep moving.

Q. Can you tell me of any lease issued by the City of San Diego which has a clause which assures the lessee of [794] exclusive use of the entire water area?

A. Yes, I believe to all intents and purposes the Campbell Machine lease has what amounts to an exclusive use. That is, that doesn't mean they can deny, when absolutely necessary, other people maneuvering over their property to get into a dock that they desire to tie up to, but they couldn't just park out there on the area that the Campbell Machine Company has as their area.

Q. Do you know of anything in the lease to prevent anyone from parking in front of them?

A. As I recall, on that lease they did definitely,—the Campbell Machine did definitely have the authority to tell them to move on.

Q. You don't happen to have a copy of the lease, do you?

A. No, I am sorry, I don't, sir.

Q. Now, I believe you have referred to this land and water of the San Francisco Bridge Company as being of high value compared to shorelands.

A. Yes, it is a very nice parcel.

(Testimony of Ewart Goodwin)

Q. That is due to the fact that it had protection both north and south by these mole piers, and due to the fact it had a long shoreline? A. Yes.

Q. Now, let's turn to the provisions of the lease [795] itself. I take it, you might have a valuable piece of land which would have a lease drawn over it so restricted as to kill many of the favorable features which existed in the land itself; is that right? A. Yes, sir.

Q. On the other hand, you might have a lease which would accentuate those favorable features; is that right?

A. Yes, sir. [796]

Q. I don't know whether you have had an opportunity to examine this San Francisco Bridge Company lease or not. But do you have a copy before you?

A. Yes; I have examined it previously and have a copy of this lease.

Q. In the first place, let me see if we understand each other about the value of leases. As I interpret your testimony, when you look at it from the owner's standpoint, the lease is worth the rate he is going to get out of it?

A. Yes, sir.

Q. Which may be too much or too little?

A. Yes, sir.

Q. In other words, if my uncle had owned Parcel 7 and wanted to give me a lease at a dollar a month, that wouldn't be a very good commercial bargain, but, if he had signed up for 20 years, that would be all he would get out of it?

A. Yes; it would be a very good commercial bargain for you.

Q. Yes. Now, if the City of National City made an arrangement regarding some mud flats which it owned, as

(Testimony of Ewart Goodwin)

a result of which it would turn out, after the expiration of a 20-year lease, there were some dry land and some good deep water, that was purely a matter between the project and the City of National City to arrange the terms, was it not?      A. Yes, sir. [797]

Q. I call your attention to the first paragraph in the lease, after the "Witnesseth," and in which it is recited that the San Francisco Bridge Company "has this day entered into an agreement with the company for filling and improvement of certain portions thereof, in consideration for which work of improvement and upon the additional considerations herein contained, the City of National City does, by these presents" make the lease, so that this element I have referred to, of improving the land on terms that were satisfactory to the owner and to the lessee, would be covered by that paragraph, is that right?

A. Yes, sir.

Q. Then we have the descriptions of Parcels 1 and 2, which were the subdivisions made in the lease, which are not the same as the Parcels 1 and 2 that are here in evidence? You understand that, do you not? In other words, Parcels 1 and 2 together made up Parcel 7, which comprises 6.26 acres?      A. Yes, sir.

Q. This Parcel A is really what is in this lease termed Parcel 3, is it not, the 8.28 water area? Is that your understanding?      A. Yes, sir.

Q. And, to go back to your direct testimony, on the land appraisals you attribute a rental of 2 cents a square foot and on the water area, taken alone, in itself, no value? [798]      A. That is correct.



(Testimony of Ewart Goodwin)

Q. This 2 cents a square foot, I take it, is the value to the San Francisco Bridge Company rather than the value to National City?

A. Yes, sir; as of the date of taking.

Q. Yes; that is what the testimony relates to. So that, in speaking of the San Francisco Bridge Company, that is typical, and by that we mean in present testimony to obtain land in that vicinity, by someone familiar with its highest uses and familiar with the whole situation?

That would have a value to that which they could afford to pay and you fix that at 2 cents? A. Yes, sir.

Q. It is true, is it not, that, when someone rents a piece of land and agrees to pay 2 cents a foot or 2 cents an acre, they do that with the expectation of being able to use the land to advantage, at a profit, paying the rent that is agreed? A. Yes.

Q. Being what you have testified is the fair rental value? A. Yes, sir.

Q. And, if they have the authority and the opportunity to make a resale or sublease that they may contemplate making a profit to them, I believe that is what you call bonus value, [799] is it not? A. Yes.

Q. Now, comparing this lease with other leases, let me call your attention, on page 2, to paragraph First.

Would you say that a lease is more or less favorable to the lessee, that is, the San Francisco Bridge Company, for example, where it is divided into an original term of 10 years, with an option to take another 10 years? As I understand, that means that at the end of 10 years, if the

(Testimony of Ewart Goodwin)

situation looks good, they can go on with their lease for another 10 years.

A. Generally speaking, that is favorable. An option is not always firm but it does give the lessee an escape if things don't look good, or a chance to renegotiate.

Q. Whereas, if they had an absolute lease for 20 years, they would have to go on paying rent whether they had made a bad bargain or not?

A. They can't talk the landlord into helping them out then.

Q. We have discussed the second part of that paragraph First, which shows that there was only a nominal rental left to be paid after the San Francisco Company had built the pier and done the dredging and filled the other lands which belonged to National City, and I believe you computed that to show how much they would get at \$10 a month, during the [800] balance of the first 10 years, and how much they would get at \$50 a month for the second 10-year term?

A. Yes, sir.

Q. Do I understand that you capitalized that total rent payment? What use did you make of that figure?

A. The rent payment?

Q. Yes.

A. I capitalized the value of the rental payments for a period on the basis of 3 per cent for the first eight years and then the value of the first \$100 per year, deferred eight years, figuring the present value of that or the discounted value, bringing it all to a head about this time; also at 3 per cent.

Q. Does that have anything to do with the value of the lease as of November 10, 1942?

A. Only indirectly in that the—or directly and indirectly in that the difference between that and the differ-

(Testimony of Ewart Goodwin)

ence in the value of the land when National City gets it back, say 18 years from now, or 18 years from 1942,—the remaining value would go to the lessee.

Q. In other words, we are getting into the other branch of the case now, where you are figuring the value of the fee. That does have a bearing on that?

A. Yes, because, naturally, the value to the lessee would not exceed the actual value of the fee. That is all [801] there is in my value and the lessees must essentially come out of that.

Q. Or, to put it the other way around, if the value of the lease amounts to so many dollars, there must be some value to the owner after the lease has expired?

A. That is right.

Q. It hasn't disappeared into thin air, has it?

A. No, but it is considerably dissipated when it is put off into the future.

Q. You don't know whether it will be there or not?

A. Or how much.

Q. Now, actually there was about a little less than \$7,000 still for the San Francisco Bridge Company to pay under this lease, was there not? A. Yes.

Q. So they had virtually prepaid their 18-year lease except for the token rental, whereas, if they had walked in and laid down \$7,000 and said, "We are paying up in full," then they would have the right of occupancy for the next 18 years, without the payment of anything?

A. That is correct.

Q. Going on to paragraph Second now, are you aware that the leases issued by the City of San Diego confined the lessee very strictly to the kind of business that he could carry on, specifying in each lease, for example, that

(Testimony of Ewart Goodwin)

[802] the property was to be used for a shipyard or for a cannery or for an oil station?           A. Yes.

Q. Do you know of any lease issued by the City of San Diego which contains the language found in paragraph Second here, that the lessee may use the property in the conduct and operation of any lawful business except only that it shall not constitute a nuisance or infringe on zoning restrictions? Is that more or less favorable than the other leases you call to mind?

A. I would say on the face of it it was more favorable.

Q. Now, take the last sentence in that paragraph Second, "The City of National City agrees to enact and to enforce during the term of this lease such ordinances and regulations as lie within its jurisdiction designed to maintain for the company the exclusive use of the water within said Parcel 3." Are you aware of any such provisions in any lease issued by the City of San Diego?

A. Not directly in that same language; I am not; no, sir.

Q. Referring to paragraph Third, I believe we do find provisions in San Diego leases, do we not, that the improvements may be removed at the end of the term?

A. Yes, sir. [803]

Q. That is a provision favorable to the lessee wherever we find it, is it not?           A. Yes, sir.



(Testimony of Ewart Goodwin)

Q. The provisions of paragraph Fourth, that "The City agree to open and maintain a public street or road across the intervening tidelands connecting with or improved street or streets of said city," that, I take it, would refer to the right to cross from Parcel 7, going over Parcel 2 or Parcel 3, and so on across city lands until they come to an open street? A. Yes, sir.

Q. And the right to maintain water, gas, telephone and electric lines in or adjacent to such road or street—would you say those are favorable conditions for the lessee to have in his lease? A. Yes; they are essential.

Q. Then, paragraph Fifth, that the City agrees to furnish police and fire protection. Is that favorable?

A. Yes.

Q. Referring, now, to paragraph Seventh, which has to do with assignment or subletting, do you know of any provision in the leases of the City of San Diego where the City specifies that it will permit an assignment of the entire lease, the only limitation being that the new assignee shall be a person whose financial standing and responsibility shall be generally accepted in the community? [804]

A. No. I may be off in my recollection but I think that that would have to be read in connection with Paragraph Ten—

Q. All right; let's go to paragraph Ten, in which "it is understood and agreed that the City reserves to its

(Testimony of Ewart Goodwin)

Board of Trustees the rights and privileges to annul, change or modify this lease upon the violation of any of the provisions hereof by the lessee, as in its judgment may seem proper." And then, further, "Reference is hereby made to all existing laws relating to the leasing of tidelands by the City of National City and by such reference all restrictions or conditions imposed and all reservations granted are hereby made a part of this lease with the same effect as though expressly set forth herein."

A. I would have to read that in connection with the clause in the act on leasing to be sure just how that worked. I don't think it is a matter of great importance. They make it subject to something which I don't think they can do in the act.

Q. If you have read the act, don't you think you will find that the language of the act is identical with the language of the provision there, "that the City reserves to its Board of Trustees the right and privilege to annul, change or modify this lease upon the violation of any of the provisions hereof by the lessee"?

A. I am not sure that it ties it in. I am not sure it [805] is material, but, if the act is here, I think we could find out.

Q. It is unfair to ask you to tell us what the acts are. Do you know of any lease of the City of San Diego which does not reserve absolutely to the City the right to cancel or annul the lease at any time, for any reason?

A. No.

(Testimony of Ewart Goodwin)

Q. So these would be, in your opinion, very much more valuable to the lessee?

A. Well, I couldn't say it unqualifiedly. The question in my mind is whether, without saying it, we are put somewhat in the same position as far as the assignment is concerned as the City is by specifically mentioning it in their leases.

Q. But assuming that this language in the lease does not run counter to any language in the statute, you would say this is a more valuable provision for the lessee than the provisions which are contained in the City of San Diego leases?      A. Yes, sir.

Q. Because of all of those favorable provisions, and in view of this very valuable location, the key of this area here, do you think that 2 cents a square foot is a sufficient value to place on Parcel 7, without giving any value at all to the 8.20 acres in which it has exclusive acreage? [806]      A. Yes, sir; I do.

Q. You stand on your original opinion on that?

A. Yes, sir.

Mr. Sloane: That is all.

Mr. Landrum: Is there anyone else?

The Court: That completes the examination by the defendants.

Mr. Crouch: No questions by the Tavares Construction Company.

Mr. Landrum: Mr. Cotton, please.

O. W. COTTON,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: O. W. Cotton.

Direct Examination

By Mr. Landrum:

Q. Where do you live, Mr. Cotton?

A. In San Diego.

Q. How long have you lived in San Diego?

A. 43 years.

Q. How old a man are you? A. 65.

Q. What is your business or profession?

A. Realtor and appraiser and property manager. [807]

Q. How long have you been in that business here in the City of San Diego?

A. Every since I have been here.

Q. You have seen the city grow through the years?

A. Yes.

Q. Mr. Cotton, will you tell the court and jury briefly something of your experience in connection with the buying, selling and handling and appraisal of real estate?

A. When I first came here, I went into the subdivision business with two partners. I was in that business for some time. I finally joined the firm; in fact I went into the firm and, as partners, we operated a subdivision of land in San Diego and sold a good many thousands of lots. And then we incorporated and I was secretary and treasurer of the company and manager there in that capacity about four years. After that I organized the Pa-



(Testimony of O. W. Cotton)

cific Building Company and we went into the business in the new company, of which I was president and general manager, of buying a tract of land and building homes and constructing other buildings in San Diego. I think that company was in existence for 20 years. During all of its life I acted as appraiser for all properties that the company bought and sold and on all of the loans that we made. After that I purchased the business of the Pacific Building Company and conducted its affairs under my own name until about two years ago, when I formed a partnership with my [808] two sons, and we now operate the business as O. W. Cotton Company. During these years my business has been to sell and deal in all types of real estate and build various types of buildings and manage properties and to appraise properties of various characters.

Q. Mr. Cotton, during the years that you have been here in the City of San Diego, have you held any positions or offices in connection with realty boards or anything of that kind?

A. Yes. In 1915 I was president of the San Diego Realty Board, and also in 1939. I was a director of the Realty Board for a number of years, in 1915, 1916 and 1917, and 1937, 1938 and 1939. I then went on the board of directors of the State Association. I was vice president of the Brokers Institute of the National Association of Real Estate Boards. I have held various positions in the appraisal division of our local Realty Board and I have been on the appraisal board of the State Real Estate Association and also the property management division.

(Testimony of O. W. Cotton)

Q. Now, have you engaged in any writings for purposes with relation to your work?

A. Yes; I have done more or less writing. I wrote the history of real estate for the last History of San Diego, the history of San Diego real estate for the last History of San Diego, published in 1936. I wrote the Rise and Fall of Real [809] Estate in San Diego for 50 years, dated in 1919. I wrote a book on How to Deal in Real Estate, and a good many articles for the National and other real estate journals and for our local newspapers, Sunday editions, feature articles on real estate.

Q. Will you just sketch briefly for us a few appraisals that you have made of particular properties, just a few of them, with relation particularly to lands somewhat similar in character to the lands with which we are here concerned, Mr. Cotton?

A. In 1921, I appraised for the Chamber of Commerce, a thousand acres, more or less, of land, industrial land, which they afterwards purchased to hold for development for industrial purposes. That extended from somewhere south of the south line of San Diego down into Chula Vista, along the water front and along the railroad. I appraised industrial lands for the Consolidated Aircraft Company, now the Consolidated Vultee, for the City of San Diego, and I appraised all of the lands, including the industrial lands, for the Spreckels Company, who owned all types of real estate in San Diego.

Q. Mr. Cotton, for how long a period of time would you say that you have been generally familiar with the

(Testimony of O. W. Cotton)

lands with which we are here involved, known as the Johnson property, for instance? [810]

A. As I understand it, Parcel 9 and the lands here which we have been calling the lands of the City of National City?

Q. Yes. How long have you known that land?

A. More or less, since I have been here, but particularly I was interested in that district when I made a large appraisal of several hundred parcels of land extending from the very north of the Destroyer Base down to National City, including a lot of National City property along this district and from there north, the property that was finally taken over and is now used as part of the Destroyer Base, about 300 parcels. I at that time became most familiar with the district.

Q. Now, I am going to ask you whether or not, in the year 1942, you were asked to make a specific appraisal of the land with which we are here concerned.

A. Yes.

Q. And did you make such an appraisal?

A. I did.

Q. Who did you make it for?

A. I will have to refer to my notes, I think. My specific instructions came from R. S. Seabrook of the Tavares Construction Company.

Q. To just get it correct, you made that appraisal at the request of the Tavares Construction Company in connection [811] with the Defense Plant Corporation, did you not?

A. Pardon me; I have two authorizations. One was Mr. Carlos Tavares and the other was from Mr. Sea-

(Testimony of O. W. Cotton)

brook of the Tavares Construction Company, both of them.

Q. And when did you start the making of that appraisal?

A. That was on September 9th that I first went down to the plant.

Q. September 9, 1942? A. Yes, sir.

Q. Just briefly, give us a little mind picture of what that land was when you went down there to appraise it in 1942, its physical characteristics as you remember it.

A. It was filled with land, filled from the spoil of the Bay. It was in very good condition as tidelands, fairly level, and the mixture of soil and silt from the Bay about the same as our tidelands in San Diego City.

Q. Did you proceed then to make an appraisal after that? A. Yes.

Q. And what were you to do? What were you endeavoring to find out in connection with that appraisal?

A. Well, the instructions were to ascertain the market value, the fair market value, of the land without the buildings or improvements.

Q. Do you mean without the improvements that the government had made on it? [812]

A. Without any buildings or improvements except in the one instance, which was the Bridge Company improvements.

Q. What do you understand to be the meaning of the term "fair market value" in a condemnation case?

A. The fair market value is the value or the highest price, in terms of money, that the land or property will sell for, if exposed for sale on the open market, given a



(Testimony of O. W. Cotton)

reasonable time to find a purchaser knowing all of the purposes and uses to which the property is capable of being used, and presuming that your purchaser is willing to but not compelled to buy and the seller is willing to but not compelled to sell.

Q. Now, just tell us what you did in making this appraisal, the procedure that you went through.

A. Well, I went down first and met Mr. Carlos Tavares and Mr. R. S. Seabrook, and the managing partner, I believe, of Concrete Ship Constructors, and I met Mr. N. J. Allender, who was the resident plant engineer of the U. S. Maritime Commission. I also met Mr. G. W. Eisenman, the project engineer, and from Mr. Eisenman I secured maps of the property to be appraised. And, in company with a guide, I went over and inspected the properties. I was given a badge so that I might come down again from time to time and inspect the property at my leisure, and during my investigation I did return to the property a number of times to look over the land and to note particularly its relation to the bulkhead line and [813] the pierhead line and the elevation, topography and accessibility to transportation facilities and so forth. In order to give an opinion as to the value of the land, I took all of these things into consideration and also the location of the land in its relation to National City and San Diego. I gave consideration to the character of the homes in the vicinity and the character of the homes within a radius of a number of miles to determine the accessibility of the property from the standpoint of the workmen. And I gave consideration to the time required for workmen to get back and forth to their homes.

(Testimony of O. W. Cotton)

Q. In connection with your investigation, did you have a talk with and did you call upon the Mayor of the City of National City?

A. Yes, sir; I discussed the matter of the taking of the leases and the listing of the properties with the Mayor, who was then Mr. Thatcher, and with the City Engineer of National City, who was Mr. Ireland, and asked for their opinion of the value of the land and the general conditions.

Q. Did you also have a discussion with Mr. Brennan here in San Diego?

A. Yes; I discussed the matter of leases generally on the tidelands and the tidelands leasing of San Diego with Mr. Brennan, to ascertain what his opinion was here and what they were doing in San Diego. [814]

Q. Mr. Cotton, in the appraisal of real estate, you gentlemen who follow that have what you call methods of approach, do you not?      A. Yes.

Q. What are the methods of approach which an appraiser uses in approaching the problem which confronted you on September 9, 1942?

A. There are, generally speaking, three methods of approach. There is the comparative method by which you compare the subject property you are appraising with other properties of similar character. There is the capitalization value, capitalizing the income and taking the total amount of capital that would be required to be used to purchase a property based on the income. And there is the value of the land and the improvements on the land. Those are the three methods that are generally used.

(Testimony of O. W. Cotton)

Q. In the problem such as confronted you on September 9, 1942, which one or two or which one of those methods did you start out with?

A. Well, I used, very largely, the comparative value.

Q. Do you mean that you attempted to find sales of property that you considered comparable to this and used that as a basis?      A. Yes.

Q. Did you attempt to approach the problem from the [815] economic standpoint at all?

A. That was not very practical and I didn't use that method. I took into consideration the leases that were on the properties, but we were in a state of war and the condition was very uncertain, and the background for leases in that district was so bad that it didn't seem practical to try to form an opinion based on the rental value.

Q. And why do you say you didn't think that was the most feasible way to approach it?

A. Because the conditions were not satisfactory. For example, there was a piece of land just north of National City, that had been leased some 25 or more years before by a man to develop an industry down there, of 40 acres, and during that whole period—I have forgotten whether it was 25 or 40 years; 25 years, I am sure—all he was able to lease was one piece of land of about five acres, and he had to carry the rest of it all that time. There was practically, until the war broke out, nothing of consequence leased in the City of National City.

Q. Were you successful in finding some recent sales in that locality of property which you considered comparable to this, for the purpose of evaluating this?

A. Oh, yes.

(Testimony of O. W. Cotton)

Q. Will you just name some of those sales for us, giving us the names of the sellers, the names of the buyers, the date of the sale and a description of the land?

Mr. Monroe: We will object to that as incompetent, your Honor.

The Court: The objection is overruled. It is about time for our afternoon recess, ladies and gentlemen. Remember the admonition during the recess and please occupy the jury room.

(Short recess.)

The Court: All present. Proceed. The last question, I believe, was unanswered.

Q. By Mr. Landrum: I believe, at the time the court recessed, Mr. Cotton, I asked you to give us a list of those sales which you took into consideration, giving us the names of the sellers and the names of the buyers and the date of the sales and a description of the property.

A. Among the sales were a property sold by John G. Ingall to the City of San Diego, John G. Ingall and Eva A. Fly to the City of San Diego. It was Block 68, S. A. Abels Addition, eight lots, except for a small strip sliced off of the front of Lots 1 to 6 inclusive.

Q. And the date of the sale, please, sir?

A. The date of the sale was October 4, 1940. The block was nearly 300 by 600 feet.

Then, a property of the Santa Fe Land & Improvement Company to the Rohr Aircraft Corporation, a portion of the north [817] 680 feet of quarter section 171 of Chula Vista, California, 10 acres, more or less, sold October 15, 1940. Another parcel by the same grantor, the Santa Fe Land & Improvement Company, to the Rohr Aircraft Corporation, the south 550 feet of the north half



(Testimony of O. W. Cotton)

of quarter section 171, Chula Vista, California, approximately 10 acres, sold on January 22, 1941. Another parcel by the Santa Fe Land & Improvement Company to the Rohr Aircraft Corporation, the south half of quarter section No. 171, Chula Vista, approximately 15 acres, sold June 11, 1941. A sale by the Tycrete Chemical Corporation to the Rohr Aircraft Corporation, a portion of the north 170 feet of quarter section 171, Chula Vista, approximately three acres. A sale by J. E. Armstrong to the Rohr Aircraft Corporation, the southwest quarter of the southwest quarter of Section 136, Chula Vista, being 8 acres more or less. A sale from the California Cotton Oil Company to Joseph Schadet—pardon me; that last sale was on August 14, 1942. The sale from the California Cotton Oil Company to Schadet was a portion of quarter section 173, Chula Vista, California, being 73 acres, sold August 11, 1941—pardon me; July 11, 1941. The San Diego, Arizona & Eastern Railroad Company, grantor, to Harry P. Boyd and Mary E. Boyd, the northwest quarter of the southwest quarter of Section 161, Chula Vista, California, being 6.27 acres. That sale was made in October, 1942. [818]

Q. Mr. Cotton, do you have a large number of these sales?

A. I have just a few more sales and listings I made in all of them.

Q. Suppose we leave it there. You do have a number of others and some listings, do you not?           A. Yes.

Q. Now, Mr. Cotton, in connection with your investigation of this property and your studies of it, have you

(Testimony of O. W. Cotton)

valued them all from the 9th day of September on through until November 10th, and then since that time?

A. Well, from time to time, naturally, knowing that we would be called upon.

Q. Mr. Cotton, what, in your opinion, was the use or uses to which this property was suitable and adaptable on November 10, 1942?

A. For industrial property.

Q. From your experience which you have given us in connection with the buying, selling and handling of real estate and your own personal knowledge of the property in this action known as the Johnson property, do you have an opinion with relation to the fair market value of that property as of November 10, 1942? A. Yes.

Q. And what, Mr. Cotton, is your opinion of the fair [819] market value of the Johnson property?

A. That is Parcel No. 9, I believe, is it not?

Q. Yes, sir. A. \$3225.

Q. \$3225? A. Yes, sir.

Q. Mr. Cotton, from your experience which you have given us with relation to the buying, selling and handling and appraisal of real estate, and from your personal studies and inspection, do you have an opinion of the market value of the lands with which we are here concerned known as the City of National City lands and all of the interests therein, as of November 10, 1942, giving to it all uses to which, in your opinion, it was suitable or adaptable, leaving out any increased value due to the improvements made at the expense of the government?

A. Yes.

(Testimony of O. W. Cotton)

Q. Now, taking the whole City of National City fee, what, in your opinion, is the fair market value of that in dollars and cents?

A. That is to include Parcel A?

Q. Yes; and also including, of course, this leasehold interest of the San Francisco Bridge Company.

A. \$248,000.

Q. \$248,000? [820]                      A. Yes, sir.

Q. Now, I believe that, within that, we have the leasehold interest of the City of National City, have we not, or I mean of the San Francisco Bridge Company?

A. Yes.

Q. Do you have an opinion with relation to the fair market value of the leasehold interest of the San Francisco Bridge Company, which should be taken out of your total here, that is, separating the San Francisco Bridge Company?

A. I arrived at that by computing the cost of the dredging and the improvements put in by the San Francisco Bridge Company.

Q. You do have an opinion of the value of the leasehold?                      A. Yes.

Q. That is included in your overall figure of \$248,000?                      A. Yes, sir.

Q. What is your breakdown on it? What, in your opinion, was the leasehold interest of the San Francisco Bridge Company worth?                      A. \$181,800.

Mr. Landrum: You may cross examine, gentlemen.

(Testimony of O. W. Cotton)

Cross Examination

By Mr. Monroe:

Q. Mr. Cotton, in connection with your experience as an appraiser, you have made appraisements in a great many of [821] the cases where the United States government has condemned lands in San Diego County, have you not? A. A number of them; yes, sir.

Q. Can you remember about how many?

A. No; I don't remember.

Q. You have testified in a number of those cases, have you not? A. Yes.

Q. In about how many cases?

A. Well, I would guess maybe a dozen or so.

Q. And in how many of those cases did you testify on behalf of owners of property?

A. I don't think any.

Q. What would you say with reference to the values of property in 1942? I am speaking now of the general trend of values in San Diego County? Was that up or down? A. What time in 1942?

Q. Well, October or November, 1942.

A. The trend was up at that time.

Q. And would you say that, in 1942, in November, prices of property generally in and about San Diego were as high as they ever had been? A. No.

Q. You think they have been some higher?

A. Much higher. [822]

Q. And when would you think they were much higher? A. About 1927.



(Testimony of O. W. Cotton)

Q. When would you say that the prices started up? You say they were on the up in 1942. About when would you say they started up?

A. About—oh, the fall of 1934.

Q. And they have been going up ever since then?

A. No. They had some recessions. When the war broke out, generally, things stopped for a while, and, when we got into the war with Japan, immediately after Pearl Harbor, things were definitely at a standstill for a while. And that was why I asked you the question as to what part of 1942 you had in mind because, early in 1942, people were on the fence, wondering what was going to happen.

Q. We were all a little bit scared then, were we not?

A. A little bit; yes, sir.

Q. As I understand you, you felt that the approach from the angle of capitalizing the rent wasn't of much help to you, is that right? A. Yes.

Q. So your opinion is not based upon any rental value one way or the other?

A. Practically entirely on the comparative sales value.

Q. On any of these sales were there concerned any property that extended from the mean high tide line out to the [823] pierhead line? A. No.

Q. Of course, we all know there are not any such sales, is that right? A. That is right.

Q. And there isn't any property of that description in San Diego Bay that has been sold at all?

A. That is correct.

(Testimony of O. W. Cotton)

Q. You did, however, as I take it, undertake to determine what it would sell for if it was salable, is that right?

A. We made this appraisal on the basis of the supposition, as we have to do very often in real estate, when you get up against a matter of that kind, of what it would sell for if it were fee-owned land. So that I appraised this in the same manner as I would if the land were fee-owned and could be conveyed.

Q. At the time you made your inspection of the land, you say it was in September, 1942?

A. The first stuff; yes.

Q. And you recognize Exhibit J, this big, long photograph down here at the end of the table, as about the way it looked at that time?

A. I haven't seen that. I will look at it.

Q. I hesitate to hand it to you because it is so big.

A. (Examining same.) That looks different from the [824] air than what it does when you are down looking up, but it looks to me like it is all right.

Q. That would be the way the layout looked at that time?

A. As nearly as I could tell from a different viewpoint.

Q. You, however, in arriving at this valuation, if I understand you correctly, disregarded what was on the face of the land entirely?

A. Any improvements; yes.

Q. And just took the land—

A. That is right.

Q. —as though the improvements were not on there?

A. Yes.

(Testimony of O. W. Cotton)

Q. What did you consider, if anything, with reference to any dredging that was made in that area?

A. I took that into consideration.

Q. Did you give that a valuation or not?

A. The dredging would be of a value to some and to some it would not. Yes; I gave the property an added value because of the dredging that was there.

Q. When you made your appraisal in September, 1942, did you appraise Area A?           A. No.

Q. The \$248,000, the figure which you now give us, in-[825] cludes Area A?

A. That was an appraisal I made a short time after that, on November 10th, I think it was, or as of November 10th.

Q. What I am getting at is the figure which you give us of \$248,000 includes Area A?

A. Yes; that is right. [826]

Q. How much valuation do you give for area A?

A. Area A, \$31,000.

Q. You give \$31,000 for area A?

A. Yes, sir.

Q. Now, the appraisal that you have given us here, is that the appraisal which you made in 1942?

A. Yes, as of November 10, 1942. That—let me explain that—this appraisal is an appraisal based on my appraisal at that time, and reviewed at the present time, but it is my opinion from that time until this time as to the value of this property as of November 10, 1942.

Q. Well, what I am trying to figure out, Mr. Cotton, is that the figure you give us today is very considerably more than the figure you get in that appraisal, is it not?

A. Yes.

(Testimony of O. W. Cotton)

Q. I want to find out what it is that makes for the difference in the appraisal, whether that was just a re-  
vival of your figures or whether you included in the ap-  
praisal you now give us something that you did not in-  
clude in that appraisal?

A. Well, there are several things. In the first place,  
my appraisal of that date was made as of October 27,  
1942. Now, you would think there is no difference be-  
tween November 4th—I mean between October 27th and  
November 10th but on October 27th the government took  
another 100 acres of [827] tidelands just north of this  
property, which there had been talk about taking up until  
that time, but until that time, and I had signed my ap-  
praisal on the the same date it was taken, I was not in-  
formed it had been taken. So in checking over my fig-  
ures, when it developed that property was taken at that  
time, and my further appraisal was of date, November  
10th, that necessarily changed my appraisal because the  
amount of available property is of material consequence  
in the value of land.

Q. You mean you increased the value of the land be-  
cause the government had taken something next door to  
it?

A. Yes. When I made my appraisal there was 100  
acres more land available for use than there was on No-  
vember 10th.

Q. So that you have increased your valuations, as you  
gave them at that time, by how much all together?

A. Well, let me see.



(Testimony of O. W. Cotton)

Q. About \$100,000.

A. No, I think it was something around \$50,000. If you want the exact figures, I will have to check them up; somewhere around that neighborhood.

Q. Well, \$31,000 of that includes, you say, parcel A?

A. Yes. Well, parcel A was increased from the October 27th figure of \$15,500 to the November 10th value of \$31,000.

Q. Now, in making your appraisal at that time did you disregard all excavations on the land? [828]

A. Yes.

Q. You did, however, take into consideration the improvements made by the San Francisco Bridge Company?

A. Yes.

Q. Your appraisal of parcel A was also made as of November 10, 1942? A. Yes.

Q. If you appraised that as of October 3, 1944, would there be any substantial difference in your figures?

A. October 3, 1944?

Q. Yes. Two years later? A. Yes.

Q. There was a very material change in values between 1942 and 1944, was there not?

A. There was, yes.

Q. Now, in appraising this property for the San Francisco Bridge Company you gave \$8,500 as the value of the pier? A. Yes.

Q. And you gave \$10,300 as the value of dredging?

A. Yes.

Q. And less damages, none? A. Correct.

(Testimony of O. W. Cotton)

Q. You mean by that, if I understand you correctly, [829] Mr. Cotton, that, in your opinion, there was no damage by reason of the favorable terms of the lease?

A. If we wanted to sell that lease to anybody who wanted to buy it, basing my calculations on the previous record of San Diego and the conditions at that time, it was my opinion that it would not be likely that we could find a customer for that lease that would pay a profit for it.

Q. Now, taking the situation as it existed in 1942, you assume for the purpose of evaluation that this property was held in fee and would be sold to a theoretical purchaser in fee; that is correct, is it not? A. Yes.

Q. So that he would have a total area of 96 and a fraction acres, a part of which was water which fronted on the Bay and extended to the pierhead line?

A. Yes.

Q. And you considered for that purpose also that it was not only available to the deep ship channel, but also that it had two railroad connections to back in?

A. Correct.

Q. And you considered all possible uses for it?

A. I did.

Q. Did you consider that it had a peculiar and unusual advantage for a shipyard?

A. Well, naturally there would be a logical location [830] for a shipyard or anything where you wanted to get to the water.

(Testimony of O. W. Cotton)

Q. Well, in that connection did you take into consideration that in addition to the railroad facilities and the water front we have spoken of, that the soil conditions entered into the condition for the purpose of a shipyard?

A. Well, I considered it for—as its greatest value for any kind of a heavy industrial business that required shipping by rail and water transportation.

Q. Well, at least, if I understand you correctly, you considered, among other things, that it had a utility as a shipyard or for shipyard purposes, regardless of whether it was peculiarly advantageous or not?

A. Yes.

Q. Now, in making that assumption, Mr. Cotton, did you bear in mind also the fact that there was no tideland property for sale around San Diego Bay?

A. I know there is none for sale. There can't be any bought.

Q. And that in 1942 San Diego had leased practically all of their tidelands?

A. The City of San Diego has, yes.

Q. Yes.

A. But there was vast acreage to the south that had not been leased yet. [831]

Q. But on the deep channel? A. No.

Q. So that bearing in mind that as you go around the Bay all the tidelands had been leased up to the destroyer base, and you have just stated the portion between the destroyer base and this property had already been taken,—

A. Correct.

(Testimony of O. W. Cotton)

Q. So, for a fellow that wanted 96 acres for a purpose, this was the last piece, was it not?

A. It was the last piece until you go further south, of course.

Q. Well, the last piece on the 30-foot channel?

A. Yes.

Q. Now, you also will bear in mind in that connection that property on the tidelands, tideland property, not only is not for sale in San Diego Bay, but it is not for sale adjacent to any city in California; that is right, isn't it?

A. Most of that is largely true. I believe there are one or two exceptions, but for the most part that is correct.

Q. That is generally a correct statement?

A. Yes.

Q. So that for practical purposes, on November 10, 1942, if you were in the position of being a broker who had this property for sale, you would have the only tract of its kind available for sale in California, wouldn't you? [832]

A. That is true, but I doubt if that could be used to influence the appraisal of the property, because it wouldn't work out just that way.

Q. Well, let's just suppose, for the sake of argument, that that was the fact. I am just trying to get relative values. Let's suppose that that was true, that you, as a broker, had this piece of property, and let us suppose I owned it and I came to you and laid it before you as a broker to sell for me. I have it in fee. It is the only piece of property of its kind. It is the only 96 acres that you could get in San Diego Bay on the deep channel.



(Testimony of O. W. Cotton)

Mr. Landrum: If the court please, I don't like to interrupt and I realize this is cross examination, but I believe it is certainly argumentative.

Mr. Monroe: This is cross examination.

The Court: I don't know what the question is. It has not been finished yet, Mr. Monroe, has it?

Mr. Monroe: No, I haven't got to it yet.

The Court: How is that?

Mr. Monroe: I haven't finished it.

The Court: You may finish it.

Mr. Monroe: I have completely lost track of where I dropped the question. I will just start over, if that is permissible.

The Court: Yes. [833]

Q. By Mr. Monroe: Let's suppose, Mr. Cotton, I came to you as the owner of that piece of land, and bearing in mind the things we have just gone over and that it is the only piece of that kind in California, I asked you what you could get for it for me on the open market. What would you think? A. What would I think?

Q. Yes, what would you tell me?

A. I would think you were a prevaricator.

Q. You wouldn't believe me to start with?

A. No.

Q. If that were the fact, Mr. Cotton, and I had for sale that piece of land under all of those circumstances, you would almost name any price you wanted to and get it, would you not?

A. No, I wouldn't say that. You would have to find the man who wanted it and who would be satisfied to take that location and all of the considerations that go with it. I wouldn't go so far as saying that. You cer-

(Testimony of O. W. Cotton)

tainly would have a monopoly, but whether you could get somebody, say, to come down from Seattle and put in a \$20,000,000 shipyard, or anything like that, is a question.

Q. It is always true, isn't it, that when you have a piece of property that is suitable and adaptable for a very large purpose, a very large type of business, the reasonable [834] time which you talk about in which to find a purchaser is considerably more than with a vacant lot out here in one of these subdivisions? A. Yes.

Q. So that where in one piece of property you might call 30 days a reasonable time to get a purchaser, on some pieces of property a year or two years is not an unreasonable time? A. That's right.

Q. That is correct, isn't it? A. Yes.

Q. And if you had this piece of property under all of the circumstances I have spoken of, and with all of the attributes you and I have discussed this afternoon, if you asked \$20,000 an acre, it would not be out of line at all, would it?

A. I wouldn't give any answer to that without making an appraisal.

Q. Without—

A. Without appraising it. You cannot appraise it offhand under those conditions. I am exposing it to the conditions I found. But to give an offhand appraisal under different conditions, that would not be very intelligent.

Q. What is it, Mr. Cotton, that I have assumed that you didn't find there at the time? [835]

A. I don't give snap appraisals that way. I think you have to take a lot of things into consideration.

(Testimony of O. W. Cotton)

Q. That is not my question. What was it that I have discussed with you in asking you this question?

A. I thought ou asked me if the land wouldn't have sold for \$20,000 an acre. That is asking me for an appraisal.

Q. No, I asked you what it was that I assumed in my questions to you that was different from what you found at the time you made the appraisal. You said you could not agree that the \$20,000 per acre was proper because conditions were different than you and I had been discussing them here. Now, in what respect were they different?

A. Well, I say this, that I can't just tell you any figure, or answer yes to any figure that you might name as to what the property would be worth under certain conditions that I have given no consideration to. I have given serious consideration to figuring out the values on this property, to the conditions as I found them. Now, you are stating an entirely new situation and expecting me to tell you what I think the property is worth. Well, that isn't practical.

Q. Mr. Cotton, can you answer me this, at least: What is there that I have assumed in my questions that is so entirely new?

A. Well, the main point I assume you want to bring out is the fact of a monopoly. You certainly have laid the proposition out as a monopoly. Whether it is here, or [836] a little piece of heaven, or any other place, you suggest that you have got a monopoly, a definite monopoly.

(Testimony of O. W. Cotton)

Q. Yes.

A. Of course, you have disregarded the fact that a man who was going in to buy a large piece of land and put in a large shipbuilding plant can, at no great expense, take the land next door at a very moderate price and extend his channel to it, and that still can be done for a considerable distance down there. So I don't think you have got a monopoly, even if you can do it, in so far as the whole bay is concerned. But if you owned the fee to the property and could sell it, you would certainly have a monopoly in so far as that is concerned.

Q. That is what I am getting at. That would bring a rather substantial and startling price, would it not, under those circumstances?

A. If you had a monopoly, you certainly could get—you would be in a preferred position, and when you could find a taker for it, you certainly ought to be able to get a good price for it.

Q. Now, I take it, as a result of that that you did not consider in making your appraisal that there was involved any such thing as a monopoly at all?

A. As the property—as the other Bay front property is leased, and tied up, it puts the property that is left at [837] a higher value.

Q. Well, in arriving at that theoretical value, and, of course, we are in accord, you and I, that it must be theoretical? A. Yes.

Q. —did you consider, for the purposes of that theory, that there was other similar tidelands for sale or not?

A. Yes, I considered it by comparison with other opportunities to locate industrial plants.

Q. Other tidelands?



(Testimony of O. W. Cotton)

A. Other lands. Other lands.

Q. That wasn't the question. Did you consider that there were other tidelands for sale or not?

A. I didn't consider there were any tidelands for sale. In making this appraisal we have to suppose and we have to consider the same as if it were for sale, but I didn't assume that there were any tidelands for sale, or there would be any tidelands for sale.

Q. Well, then, did you consider the status in arriving at that figure,—did you consider the status of the other tidelands at all, one way or the other?

A. I considered them all on the basis of a fee basis.

Q. Well, you considered it as though all the tidelands would be for sale?

A. No, I considered—maybe I better make myself clear. [838] Probably I didn't use the correct terminology there. I took into consideration the sales that had been made in the other properties that would be good for industrial properties, properties that had been sold on a fee basis that would be good for industrial purposes, some that came to the present tidewater, and I assumed that arrangements could be made to get to deep water, if they wanted to; and others that did not come to tidewater, that were back east of the railroad. I took all of those things into consideration to determine the value of that type of land, giving more value, of course, to property that had greater advantages from transportation and tidewater than I gave to property that did not have such advantages.

Q. Well, you don't make it quite plain to me yet, and perhaps I have missed it, as to whether or not you considered that in arriving at this theoretical value of \$248,000

(Testimony of O. W. Cotton)

you considered that other tidelands could be sold, or whether you considered that the other tideland was as it actually was and could not be sold.

A. I tried to get to this theory, that if we had a purchaser, if we should develop a purchaser for this property, as to what he would pay for this property for all of the uses to which it could be put by comparison to what he would pay for other properties which had been sold.

Q. Now, in arriving at this \$248,000, I take it, from [839] what you have explained to us today, that you didn't arrive at that by computation, but that was simply the best effort that you could make in determining the market value of it, lock, stock and barrel as it stood; is that right?

A. By taking all of the properties that had been sold into consideration, and all of the other elements that I considered of value to form an opinion, I arrived at what appeared to me that a man desiring that property would be willing to pay.

Q. Now, in valuing any piece of property, Mr. Cotton, unless it is a simple thing like a lot in a subdivision, where the prices have been fixed, in valuing, or in forming an opinion of the value, you have in your mind a certain range of values, do you not?      A. Yes.

Q. In other words, you look at a piece of land and say, "Well, this piece of land ought to bring about five or six thousand dollars, something like that"; is that right?

A. Yes, by comparison with other properties.

(Testimony of O. W. Cotton)

Q. And in this particular piece of land, when you formed an opinion as to the market value, what range of values did you have in mind? From what to what?

A. I believe it was from about \$1,000 to \$5,000 an acre. [840]

Q. You figured that it was worth somewhere between \$1,000, and not less than \$1,000 an acre, and not more \$5,000 an acre?

A. Some parts of it would be, if you divided it up into slices, some parts would be worth more, and some would be worth less.

Q. I am just talking about the overall value, and what I am trying to get at is this: You say you have finally centered on the figure of \$248,000. But in arriving at that figure, did you have an idea it was between certain figures, that the value would be between certain figures?

A. I took the different units, and I said, "This unit would be worth so much by comparison with these other properties within, we will say, from one to a five-mile radius, and with certain advantages this property would have a certain value," and, "this property would have a certain value," and when I got through, I took the total of it.

Q. You don't mean by that, of course, that you took various parcels and treated them as though they were being sold separately? You don't mean that, do you?

A. Only in figuring out the approximate acreage.

Q. Well, you treated it, however, as a sale of the entire 96 acres?

A. As a whole, that is right.

Q. Under one ownership to one purchaser? [841]

A. That's right.

(Testimony of O. W. Cotton)

Q. In arriving at that figure, did you consider that there was any added value by reason of its being a rather unusually large piece of water-front property?

A. The experience in San Diego has been such that you can't be sure of whether a piece of land will sell better in a large unit or in several small units. Our town isn't as big here as Los Angeles, San Francisco, and Seattle, and sometimes our big ideas don't work out, so that an appraiser is not going to be safe when he says, "Here, this land will be most profitably sold in one piece," because it is quite possible you may get a surprise, and you may find you can sell it better in four or five pieces.

Q. Well, if it was being used for a shipyard, you would want it in one piece, would you not?

A. Yes.

Q. And do you consider as a shipyard, being the highest and best use?           A. I wouldn't say that.

Q. Well, do you think that there is some use for which it would be more valuable than as a shipyard?

A. It might possibly be. I wouldn't attempt to determine any one specific kind of industry that could be promoted and that would be the one thing. I took it as an industrial property and gave a range as to what it could [842] be used for, but I wouldn't take the responsibility of saying that there was any one specific type of industry that it would be more valuable for than others.

Q. Well, when you value a piece of property, I have been trying to get at whether you had in mind this property had a possible range of values someplace around \$248,000, or whether you would say this is worth ex-



(Testimony of O. W. Cotton)

actly \$248,000, and not one dollar more, nor one dollar less?

A. Well, that would not be a very sensible appraisal, because if you are considering as to what you might do with a piece of property, all you can do is to arrive at about what you think that you could find a customer for that property for, and if you go to split it down into dollars and cents on transaction of that size, why, you are going too far. An appraisal doesn't go that far. As you said yourself, it is only an estimate after all, and it is an opinion.

Q. Well, was it your opinion that if you had a purchaser that you might get exactly \$248,000, or was it that you might get more or might get less, or get about \$248,000? I am trying to get at how you get this figure of \$248,000.

A. I would say your term is correct, about \$240,000—\$248,000 would be about the figure that one should expect to get for the property.

Q. Might it be less?

A. Why, it certainly might. It might be more. [843]

Q. It might be more. A. Yes.

Q. What you are trying to figure, that is about the average?

A. That would be my estimate as to what it would seem to me that the property would have brought at that date.

Q. But you, in figuring that it might be more, or might be less, you do not use the highest value, but use the average value?

A. We use in making an appraisal about the figure that you think you are going to tell your owner as to the

(Testimony of O. W. Cotton)

true facts of the case, and if in my judgment after giving it full consideration I think that he should get about \$248,000, that is what I tell him.

Mr. Monroe: I have no further questions.

### Cross Examination

By Mr. Muir:

Q. Mr. Cotton, following along with the same trend of thought as Mr. Monroe with reference to the Johnson parcel, which is parcel 9,— A. Yes.

Q. —you would say your figure of \$3,225 would be about a fair average of several prices, more or less, that you arrive at to give that figure?

A. I wouldn't say that. I would say that, after [844] giving consideration to the various sales throughout the district and the general market conditions, and the buyers that we had, and the particular advantages of that property, that my estimate of the price that that property should sell for would be \$3,225.

Q. If at the time of your making up your opinion of that value you had known that there was a buyer ready, able and willing to pay \$7,000 for that property, would that have affected your determination of value?

A. I would have to know what was the cause of that. Sometimes a buyer will pay more than a property is worth, and it would first be necessary that I know why he would pay such a price as that, and then before I could determine whether there was some value in that property that I had overlooked, or whether he was just making a mistake and paying too much.

Q. Well, if we assume he made an offer and stood ready, able and willing to buy it for \$7,000?

(Testimony of O. W. Cotton)

Mr. Landrum: That is objected to, if the court please. I don't think there is any such evidence as that. My recollection is that it was after the taking that this offer was discussed, sometime after 1942.

The Court: I don't recall of any firm offer before the date of the taking.

Mr. Landrum: There wasn't, your Honor. [845]

Q. By Mr. Muir: Mr. Cotton, if you refer to this parcel which is just immediately to the south of parcel 9, the part there that runs up to 15th Street and is divided by the ramp part of parcel 9 that is indicated,—

A. That little strip?

Q. That little strip there.                      A. Yes.

Q. If we assume that in 1942, July or August, a buyer then was ready, able to and willing to pay \$7,000 in cash for that portion, and subsequently renewed his offer two years later and bought it for that figure, would that affect you in arriving at your opinion of value of this parcel 9?

A. Before I could give an answer on that, I would have to know why, because I have seen many instances where people pay too much for a piece of property and are sorry afterwards. So just the fact that somebody wants to pay more than there is any apparent justification for a property does not affect the value. You have got to have some reason back of that.

Q. Well, in this matter he had some two years to think it over, that is, two years elapsed between his two offers. That is, in 1942 he offered to buy it, and in 1944 he again offered to buy it, and at that time it was sold to him.

(Testimony of O. W. Cotton)

Wouldn't that be a determining factor that he was not acting under any pressure or quick judgment?

A. I can't see where you can add anything to the value [846] unless we know what the reason was that made it more valuable. We see many instances where people will pay too much for a property. We see instances where they won't pay enough and don't get it. Sometimes they offer too little, and do get it. But where a person offers more than an appraiser can see the property is worth, you can't change the value, because some person makes a mistake like that. That doesn't affect the value. If there is some reason for it, that is one thing.

Q. What would you say is the reasonable market value? That is, the definition?

A. The market value?

Q. Yes.

A. Well, as I started,—do you want me to repeat what I said a while ago?

Q. Yes, I would like to have you repeat it.

A. All right. The market value is the highest price, in terms of money, for which a property will sell, land, a property will sell, if exposed on the open market for a reasonable time to find a purchaser knowing all of the uses and values to which the property may be put or is capable of being used, and also on the supposition that the seller is willing but not compelled to sell, and the buyer is willing but not compelled to buy.

Q. Very well. Now, assuming this buyer we have been talking about is not forced to buy and the seller certainly [847] were not forced to sell, because two years had elapsed, and that also is evidence of the fact that the buyer wasn't forced to buy and the property was exposed



(Testimony of O. W. Cotton)

for sale on the open market, and there was a reasonable time elapsing for him to make up his mind and to gain full knowledge of all the uses and purposes to which this particular land was adapted, don't you say that \$7,000 offered and paid for this property would be a fair, reasonable market value, as fitting into your definition of market value?

A. I would say that there was something that we didn't know about that caused him to make that offer, and until we knew about it, it would not be practical to change a valuation.

Q. In other words, if you had that fact before you, and we will assume you did have that fact in arriving at your opinion of value, you would not have considered it at all?

A. I would try very hard to find out what the reason was. It is our business to find out all of the things that pertain to the value of the property, and I make it my business to find out why it was valuable, and if there was a value in that little piece of land that we don't know about, why, we should know about it before we make our valuation.

Q. Well, you have stated here that you considered other sales within a five-mile radius in arriving at your judgment as to value, yet you would exclude this particular [848] parcel because it is the only one that is adjacent to it—

Mr. Landrum: Just a moment. If your Honor please, I will have to object to that. Here is a sale two years after November. No one could have known.

The Court: As I remember, that sale was in 1944?

(Testimony of O. W. Cotton)

Mr. Muir: That is correct, your Honor. The offer was made in 1942.

The Court: There was no sale?

Mr. Muir: No sale.

The Court: You are talking about a sale.

Mr. Muir: Yes, your Honor. I see the objectionable portion.

Q. By Mr. Muir: Now, in reference to sales within this five-mile radius, I understood generally from your testimony you referred to sales of property in large plot-tage in reference to determining the value of National City's property; is that correct?

A. Sometimes large properties, sometimes 50-foot lots.

Q. And those were used by you, these other sales, in arriving at your opinion of the value of the National City property?

A. Taking the—I think I should explain that these sales extended from Chula Vista and up to 32nd Street in San Diego. A number of them were right in National City, very close to this property. [849]

Q. Now, you know where the streets or the property at Sampson and Colton is in San Diego?

A. Sampson and Colton, I know approximately, yes.

Q. Would you say that that property is within five miles of these parcels?

A. Well, whether it is or not, it is not comparable.

Q. In other words, I need not cite you any of these sales that took place here, because they are all not comparable?

A. I didn't say so. I said that particular property.

Q. The southeast corner of Sampson and Colton, lots 43 to 48, Block 53, San Diego Land and Town Com-

(Testimony of O. W. Cotton)

pany's addition,—you would state that that property is not comparable, Mr. Cotton?

A. I have got it on the map here. What block is it?

Q. 53. A. 53, Sampson and what?

Q. And Colton.

A. The difference between that property and the subject property is that this, of course, is much nearer to the city of San Diego, and would always, of course, bring a far higher consideration.

Q. Well, how many miles would you say it would be from parcel 9?

A. Well, I should think it would be a couple of miles, [850] two to three miles, something like that.

Q. Yet, you considered other properties in San Diego five miles distant from these parcels we are here concerned with?

A. From the larger parcels or, for the larger parcels. [851]

Q. Are you familiar with this small sale, so to speak, for \$1,750?

A. That occurred in June, 1942, of Lots 31 and 32, Block 83 of Manassee & Schiller's Subdivision, plus part of the railway right-of-way, being .201 of an acre. That is on Main Street, isn't it?

Q. On Main.

A. Yes. That isn't in any way comparable to any of the properties that we subdivided or that we appraised down at National City. There is just no way you can make a reasonable comparison with those properties. I knew of that sale but it isn't possible to compare it.

(Testimony of O. W. Cotton)

Q. That was rental which would have been at about 20 cents a square foot, or \$8700 an acre, wasn't it?

A. Whatever it was. I didn't use it for comparison because it was a different class of property.

Q. It is sort of comparable to Johnson's property, isn't it?

A. It is a different location. Main Street is our main thoroughfare from San Diego to National City and the subject of this property of the Johnsons is not on a main thoroughfare, and you can't compare this at all.

Q. Mr. Johnson's property was right near the water front? Isn't that comparable?

A. Well, it isn't very close to the water front. You [852] have railroad tracks between that and the water front.

Q. It is just across the street, isn't it?

A. Yes; you have got the railroad tracks there.

Q. The railroad tracks come on down the middle of Harrison Street, don't they?

A. I shouldn't consider it a property that is in the least comparable. In looking these properties over, I selected those that I considered were fairly comparable, and I did not make comparison with those that are not comparable.

Q. I presume you took into consideration but excluded these sales where they ran about 8,000 or better per acre?

A. Which ones do you refer to?

Mr. Landrum: If your Honor please, I don't like to object, but it seems to me it is improper for counsel to read figures here, without laying any foundation for them. I object to the form of the question and I object to coun-



(Testimony of O. W. Cotton)

sel continuously reading figures here unless some foundation is laid.

The Court: Some of them have already been propounded in questions to others but that last one I don't recall.

Q. By Mr. Muir: Mr. Cotton, you appraised for the Tavares Construction Company, didn't you?

A. Yes, sir.

Q. That was in 1942? A. Yes. [853]

Q. Did you appraise the Johnson's property at that time? A. No.

Q. When did you first appraise his property?

A. That was on August 20, 1943.

Q. Did you appraise that for the United States Government or for the Defense Plant Corporation or some other agency of the government?

A. I made this for the U. S. Maritime Commission.

Q. Did you make that for the purpose of arriving at a determination of whether or not the rental under the Tavares lease was reasonable?

A. I made it for the purpose of arriving at a fair market value of the property as of that time.

Q. Government counsel asked you about your appraisal approach in this matter and you stated it was upon two grounds, one, comparable properties and, secondly, you considered leases. In respect to Johnson's property, did

(Testimony of O. W. Cotton)

you consider the lease the Johnsons had with Carl Bliss at \$100 a month?

A. We always try in making appraisals to take all matters into consideration and, of course, I took into consideration the fact that those leases were in existence.

Q. How long did that lease run, Mr. Cotton?

A. The one to Bliss? [854]

Q. Yes; the lease to Bliss, that Mr. Johnson got \$100 a month for.

A. As I recollect that, that lease was changed I think. Was it not? Wasn't it changed to \$75 a month and \$35 of that was applied to the addition of another building that was put on there? I think they reduced it to about \$40 a month. Wasn't that the condition?

Q. You should know more about that because you appraised this property upon the basis—

A. That is as I recollect it.

Q. Did you take into consideration the five-year leases that were executed by the Tavares Construction Company and by Carl Bliss, both in favor of the Johnsons?

A. Oh, yes.

Q. One at \$35 a month and one at \$40 per month?

A. I think the \$40 a month one was the one that applied to this property.

Q. Would you use the same percentage of capitalization to arrive at fair market value figure by reference to the rentals, as has been previously discussed here?

A. I don't consider it possible to arrive at a capitalization value on that type of lease. You have a lease there

(Testimony of O. W. Cotton)

that is very much out of line by comparison with anything else in the district. So it looks like they were paying too much. If that was done merely for a war emergency, [855] that is one thing. If the war were to come to an end in six months, obviously, they were paying too much. It would stop. So it isn't practicable in establishing a fair market value of a property to give capitalization on such a rental as that. It just wouldn't work out. While I took into consideration the fact that the owner would be getting, if this continued five years, a very handsome profit on his investment, it would wipe out a good deal of the value. I took that into consideration in giving the value of the land because I gave the value of the land much more than the value of anything else in the neighborhood, and that had a material influence. But I do not consider it would be practical to try to arrive at a capitalization value on a lease of that kind, made under war conditions which might terminate at most any time, and take that as a permanent value of the land. It doesn't seem practical to me.

The Court: I think we will suspend now until tomorrow morning. 9:30 in the morning, ladies and gentlemen. Remember the admonition heretofore given you and keep its terms inviolate.

(Thereupon, an adjournment was taken to 9:30 o'clock a. m., Tuesday, February 25, 1947.) [856]

San Diego, California, Tuesday, February 25, 1947.

9:30 A. M.

The Court: All present. Proceed.

Is there something *ex parte* here?

(Another case called.)

The Court: Now, I think we are all present and you may proceed.

O. W. COTTON,

called as a witness by and on behalf of the plaintiff, having been previously sworn, resumed the stand and testified further as follows:

Cross Examination

Mr. Muir: May it please the court, I do not wish to ask Mr. Cotton anything further.

By Mr. Sloane:

Q. Mr. Cotton, I would like to ask a few questions on behalf of the San Francisco Bridge Company. I am not interested in the figures that you gave for fee values, and so forth, but I am greatly interested in the value which you gave for leasehold value, which I believe you said was \$18,800. A. Yes.

Q. And that allowed to the San Francisco Bridge Company nothing whatever for their bargain or their bonus or whatever you want to call it? [858] A. Yes.

Q. I believe you said that in arriving at the fee values you scouted around in an area of from one to five miles in diameter to try to locate similar sales of similar property.

A. From adjacent to the property to several miles.

Q. Did that go in all directions, north, east and south?

A. I went south several miles and I went north several miles; east only a few blocks, because east you soon come



(Testimony of O. W. Cotton)

to the business district of National City, and you certainly would not find any comparative sales there that would be worth considering.

Q. However, you didn't go farther west, out into the Bay?

A. Not very far, no.

Q. But you did examine values in some transactions up towards the San Diego industrial district?

A. Yes.

Q. Now, did you make the same search in trying to locate leases that had been negotiated about that time or before that time on tidelands?

A. I checked with Mr. Joe Brennan the conditions for leaseholds in San Diego, and I was familiar with the Cal.-Co. lease down near National City. I made what I considered a [859] reasonable check on leases to determine what the general conditions were, to arrive at a fair value.

Q. You did find several parcels that had been lately leased by the City of San Diego to private corporations or individuals?

A. There were quite a number of leases that I checked.

Q. This first search you made, I believe, was in October, 1942?

A. Yes.

Q. And at that time you actually were on the ground in question here?

A. Yes.

Q. How did you arrive at this figure of \$18,800?

A. I took an estimate of the amount of the cost of building the pier that has been built there, the improvements, in other words, and then I took—made an estimate of the cost of dredging, according to the lease requirements for the dredging of that area, and took the sum total of those and arrived at the cost that it would appear that the Bridge Company should have expended in order to meet that part of their lease. [860]

(Testimony of O. W. Cotton)

Q. By Mr. Sloane: What relationship does that have with the values that they could receive for 18 unexpired years of their lease?

A. I took the position and I take the position that, under the market conditions at that time, it probably would not have been possible for them to have sold their lease or for anyone to have sold their lease at a profit. So that I could see no way that they could be allowed a profit in their lease.

Q. In other words, you figured they would have to pay out under their lease, during the ensuing 18 years, about as much value as they would get out of the lease?

A. No; I didn't say that. If they continued to own or were privileged to continue to own the lease, it is quite possible they might have made untold profits, but that wasn't the point. The point was what would be the fair market value of that lease if sold to some outsider on the open market at that time and, judging by the fact, for example, that the lease next door had defaulted and was not sold and there were 30 acres just south of this property that could be leased and was not leased, and the record of lack of customers for that type of lease in the vicinity of National City, and the fact that the war was on and that it was quite possible, as soon as the war was over, the thing would slip back into its old groove, it would seem to me that there was not an opportunity [861] to sell that lease to anybody else at a higher figure than they had themselves. So that, if we returned to that investment, that would be about as far as we would go.

Q. Suppose their investment was actually \$70,000 instead of \$18,000, would that have made any difference in your estimate?

A. I sent a telegram to—

(Testimony of O. W. Cotton)

Q. I am just asking you the question.

Mr. Landrum: Just a moment, if the court please. I submit the witness should be permitted to answer the question.

The Court: He should get at it directly without stating the details about sending the telegram.

Mr. Sloane: May I have the question read, your Honor?

(Question read by reporter.)

The Court: Don't give the details if you don't agree with the supposition as in real existence, if you know that it isn't. You may answer the question.

The Witness: My answer to that question would have to be no. And I would like the privilege of explaining the question if it is permissible, or my answer.

Mr. Landrum: I submit, your Honor, he can go ahead with his explanation at this time.

Mr. Sloane: The answer is no. I don't see that it calls for an explanation.

The Court: I think not. It was a direct question.  
[862]

Q. By Mr. Sloane: You take your view of the market value by reason of the conditions as they were on the ground November 10, 1942?      A. Yes.

Q. Will you observe this panorama photograph, Exhibit J, and state whether that is a correct reproduction of what you did see or what was there on the ground in November, 1942?

A. It would be hard to state that that is exactly what I saw on the ground because I saw it from the ground and not from the sky; but, in looking over this panorama yesterday, it seemed to be about what I would expect.

(Testimony of O. W. Cotton)

Q. In other words, you didn't see a vacant area, as would be reflected on the plat on the board, but you saw an active area, with buildings and workmen and machinery and a going concern there?

A. Oh, yes; it was very active.

Q. Did you also notice on the grounds of the San Francisco Bridge Company itself, Parcel 7, signs of activity and a going concern?

Mr. Landrum: Just a moment, if the court please. That is objected to on the ground and for the reason that the activity was on the part of the government of the United States.

The Court: Overruled. I am not saying that that is not true as it is an element in the case. [863]

Mr. Sloane: Referring now to a date particularly prior to November 10, 1942.

A. I don't remember any activity on this parcel. I went down and went over the wharf a time or two and looked around, and there was a small movable shed at the time on the property, but at the times I was there I don't recall any activity on the Bay property.

Q. There was a pier there?

A. There was a pier there; yes.

Q. And gear piled on the shore and machinery?

A. Very little.

Q. I believe you said that you made your original estimate of value here at the instance of the Tavares Construction Company, October 27, 1942.

A. I made two appraisals; one estimate on that date and one estimate before that, I think in September.

Q. Referring now to your October 27, 1942, appraisal, in that I believe you said you took into consideration and



(Testimony of O. W. Cotton)

I understand that is the same appraisal you make now so far as this San Francisco Bridge Company lease is concerned?       A. Yes.

Q. In making your valuation then and now, did you take into account the leases which had been entered into by the City of San Diego, to which you referred a few moments ago?

A. Yes; I gave consideration to those leases. [864]

Q. And, in giving consideration, you took into account the rentals called for?       A. Yes.

Q. Did you also make an examination of the terms of the city leases as compared to the terms of the San Francisco Bridge Company lease?       A. Yes.

Q. Is it a fact that one of those leases that you considered—withdraw that. Is it a fact that there were a number of leases which you considered, and that you enumerated those on page 11 of your appraisal, under date of October 27, 1942?

Mr. Landrum: If your Honor please, if there is any question about this appraisal, I tender a stipulation to counsel. He is cross examining on it. I am perfectly willing that it go in evidence. [865]

Q. By Mr. Sloane: Well, I will not be very long on this. I want to call his attention to the Cal.-Co. lease, for example, which is referred to on page 11.       A. Yes.

Q. That provided for a rental of one cent per square foot for the first five years, two cents per square foot for the next five years, four cents per square foot for the next ten years, and five cents per square foot for the last five years; is that correct?       A. Yes.

(Testimony of O. W. Cotton)

Q. I believe you remarked that these other leases had been entered into by the City of San Diego within the last three years, as you found?

A. Whatever the reference is. I don't remember all the figures.

Q. Do you have before you the copy of your appraisal?

A. Yes.

Q. Now, the next citation is as to the lease of the San Diego Gas and Electric Company, in which is provided a rental of one cent per square foot for the first five years, two cents per square foot for the next five years, four cents per square foot for the next ten years, and five cents per square foot for the last five years.

Then the next one is San Diego Marine Construction Company, which provides one cent per square foot for the first [866] five years, and one cent minimum or three cents maximum for the next five years, that apparently being a shorter lease, for ten years.

The next one is another short lease, is it not, starting at one cent. The next one is a short lease, starting at one cent. The next one is a ten-year lease on a monthly basis, is it not? The next one is a short lease at one and one-half cents per square foot. The next one is a short lease, a year-to-year lease, at one and one-half cents per square foot.

Taking these into consideration, did you have in mind at the date of this valuation, the comparative rental value of the San Francisco Bridge Company's National City lands?

A. I gave consideration to these leases in arriving at my appraisal.

(Testimony of O. W. Cotton)

Q. Are you aware, or will you follow me, please, as to the actual rental which would be paid under, we will say, a 20-year lease which allowed one cent a square foot on the area involved here, say, for the first ten years and two cents a square foot for the next ten years? That is an element that a willing buyer would figure on and take into consideration, is it not, what rental values would amount to over a period of time?

A. I don't believe I quite follow your question.

Q. Well, perhaps I am a little involved. [867]

A. Yes.

Q. Let's assume that on November 10, 1944, or the day before, you have a prospect, a willing buyer who is interested in acquiring land for the uses to which this particular land was adapted at that time. Now, I assume that he would look at the land as you did, and would see around there the things that you did. He would take into consideration the availability of any other land of a similar type, or the lack of availability. He would get out his pencil and paper and figure what rent it would cost to rent that kind of property, would he not, or what the purchase price would be, if you could buy that kind of property? All of these things would be involved in the mental processes of this willing buyer?

A. Yes.

Q. Now, assuming that, as the evidence shows here, this parcel which was under lease to the San Francisco Bridge Company involved or covered 629,878 feet. That is what the 14½ acres amounts to. If that rented for the first year at one cent a foot, it would mean a rental payment of almost \$6,300, would it not? A. Yes.

(Testimony of O. W. Cotton)

Q. And during the eight years immediately following in the period of the original ten years we are supposing here, with the lowest rental of one cent a square foot, this willing [868] purchaser of the lease would pay out \$50,000 in rent? Does that sound right to you?

A. Well, I would assume that you are correct.

Q. It is eight times \$6,300? A. Yes.

Q. Now, if at the end of the first ten-year period, that is, eight years from the date we are considering, the rent should step up, as all these other rents do, and not step up in five years, but step up after ten, and not step up the 2 and 4 you have, but step up to two cents, then the rent per month would be double what it was before, would it not, or would call for a rental payment of \$12,600 a year, and running for ten years, this willing purchaser of the lease would have to put out \$126,000 in rent, would he not?

A. If your figures are correct, yes.

Q. Or a total expenditure for rent for this term of ten years of \$176,000. Now, we are back on the ground with your willing purchaser of the lease here again, and you, with your well-known powers of salesmanship are pointing out to him the advantages of purchasing this lease from the San Francisco Bridge Company. Wouldn't your presentation, and the consideration of the buyer run along about this line: these improvements have been put in at a cost or a value of \$18,800. National City still has \$7,000 coming to it for rent under the terms of this particular lease. So [869] by an investment of \$25,800 you can procure the right to use this property for the ensuing period of 18 years. Now, you are in competition with people who are going to pay rent, and assuming that our rent is low, that is, one cent a square foot, the first ten-



(Testimony of O. W. Cotton)

year period and two cents a square foot for the next ten-year period, your competitors are going to have to pay out \$176,000 in rent. Don't you think you could have got from this willing purchaser a little something for the value of our bargain, for the bonus? Couldn't you have got two or three or four thousand dollars?

A. You have already got the 30 acres adjoining this land that came clear to deep water, to 30 feet of water, that was not leased, and there were no takers for it.

Q. What land is that?

A. The land belonging to National City right adjoining on the south, and there were no takers for it. It came clear to deep water. This is only on nine feet of water.

Q. Do you mean this is an area south of parcel 3, now?

A. Yes, south of your lower piece here there is 30 acres of land that was not leased.

Q. It wasn't filled either, was it, until the San Francisco Bridge Company filled it?

A. It was filled at that time, yes.

Q. That is a part of the consideration that the San Francisco Bridge Company gave for this lease to the City of [870] National City, isn't it?

A. I don't recall now.

Q. Now, your buyer, in making that investigation and taking those considerations would have taken into account these things, and perhaps other things I would be glad to have you mention, if you wish to. One of them would probably be the relative value of leasing or of buying, would it not, assuming he could buy anything? I want to ask you whether that prospective buyer wouldn't have considered that he might purchase at a price which

(Testimony of O. W. Cotton)

would involve a good bonus to the San Francisco Bridge Company and still be better off than if he would make an outright purchase of the property. Directing your attention, so you will know what I am talking about, to some considerations which you set forth in this appraisal—it is rather voluminous, and I am not too familiar with it, but on page 11 you have a chapter, shall we call it, entitled, “Examples of San Diego Tideland Leases,” from which I was quoting you references a while ago?

A. Yes.

Q. And on page 12, is it not true that as a part of your consideration you took into account the things I am about to read to you here, and that a prospective buyer would naturally and ordinarily take them into account also? Let me see if I quote you correctly here from your written appraisal: [871]

“At first glance it would appear that the rentals charged by the City of San Diego for the use of its tidelands would be placing an extremely high value on these lands, but as a matter of fact quite the reverse is true, because on city tidelands the lessee saves his capital investment in the land and there are no taxes to be paid on the land; buildings and equipment are assessed by the County Assessor at 50 per cent of cost the first year and amortized over the life of the lease. In the lower rental brackets there is a marked advantage in leasing from the city in preference to fee ownership. When time carries the lessees into the higher brackets, the lessees’ increased business may justify the higher rentals; if not, probably some modification will be made.”

Was that your opinion, and did you so express it?

(Testimony of O. W. Cotton)

A. Yes.

Mr. Sloane: That is all.

Q. By Mr. Crouch: Mr. Cotton, did I understand you to say that you had appraised some 150 different appraisals for the United States government?

A. A good many more than that.

Q. Did I hear you correctly, and did you say that in all of your experience as an appraiser you had never yet [872] testified against the federal government?

A. I don't think I ever have. I don't remember to have done so. I am not sure.

Q. You were considerably handicapped in making the appraisals and giving the values that you have testified to here yesterday and today, weren't you?

A. I didn't think so.

Q. You said that as a preparation for arriving at your valuations, you talked with a good many people, one of them a man by the name of Allenger?

A. Well, I talked with—

Q. Yes or no, please.

A. Let me have the question again.

Mr. Crouch: Read it, please.

(The question was read.)

The Witness: Yes.

Q. By Mr. Crouch: Who was he?

A. He was a representative of the Maritime Commission here.

Q. How many different times did you talk with him while you were making this appraisal, approximately?

A. Oh, I don't know. I suppose a half a dozen times, or more; maybe a dozen.

(Testimony of O. W. Cotton)

Q. You have been in court and heard some of the testimony, haven't you? [873]

A. In this case? Yes.

Q. Were you here when I pointed out to the jury the various clauses in the contract of our clients, the Tavares people?

Mr. Landrum: Now, if the court please, I don't like to interrupt, but certainly this witness has not testified with reference to the Tavares contract, and it is not proper cross examination.

The Court: The objection is sustained.

Q. By Mr. Crouch: As a matter of fact, that appraisal that you made in 1942, in September, was made on behalf of the United States government for the very purpose of determining how much money they had to put up in court in this very case; is that not the truth?

A. I am not sure on that.

Q. And the lower you made your appraisal, the less money they would have had to put up; isn't that true?

A. That had nothing to do with it.

Q. No, you just answer my question, and I will do the arguing. A. Let me have the question again.

Q. Read it, please.

(The question was read.)

A. I don't know. [874]

Q. By Mr. Crouch: Well, do you know that your fees for making that appraisal were paid by the United States government? A. They were.

Mr. Landrum: I have no objection whatsoever to the letter, if your Honor please, and I am perfectly willing to stipulate with counsel how much Mr. Cotton got for his job. I will agree he was paid and paid well.



(Testimony of O. W. Cotton)

Mr. Crouch: Do you want to argue the case?

Mr. Landrum: I am not arguing. I will agree with you.

Mr. Crouch: Then, can you contain yourself for a while?

Mr. Landrum: I can contain myself. Go ahead.

The Court: You have done pretty well so far, gentlemen. I think you had better not keep it up.

Mr. Crouch: What is the next number, Mr. Clerk?

The Clerk: Exhibit X.

Mr. Crouch: Exhibit X reads as follows—

Mr. Landrum: May the record show, if your Honor please, it is in by stipulation?

The Court: Yes; it may so show if he is going to read it to the jury.

Mr. Crouch: I think the record should show that when he stipulated to it.

The Court: Don't argue in court.

Mr. Crouch: Leaving off the immaterial parts, it is a [875] letter from James H. Roper, Division Engineer of the Defense Plant Corporation, addressed to Mr. Gregory D. Smith, Administrative Manager of the Tavares Construction Company.

“Dear Mr. Smith:

“Reference is made to your letter of September 28th, with which was enclosed invoice of Mr. O. W. Cotton in the amount of \$500, covering appraisal services in connection with the site for the project, and also to Mr. Seabrook's letter of October 17th, advising that additional services of Mr. Cotton had been furnished at an additional charge of \$500, mak-

(Testimony of O. W. Cotton)

ing the total cost of the appraisal reports \$1,000. We regret that it was necessary to hold for so long a time the original invoice of Mr. Cotton but, in view of the fact that no funds were available for paying it, we were unable to approve it. As you know, the condemnation is being done through the Maritime Commission, which will pay the costs and take the title to the land. An appraisal fee would seem to be a proper charge against the acquisition of the site but we believe it should be paid by the Maritime Commission. Accordingly, we are returning the invoice of \$500, dated September 14th, for your disposition."

May the record show, Mr. Landrum, that this letter is received by stipulation?

Mr. Landrum: I have no objection to it except what they have written on it with lead pencil, your Honor. [876]

Mr. Crouch: I will rub that out. I didn't notice that it was there. This will be Exhibit Y?

The Clerk: Exhibit Y; yes, sir.

Mr. Crouch: This is a letter to Mr. O. W. Cotton, written by the Tavares Construction Company, dated October 15, 1942.

"Subject: Appraisal of land as shown on key map.

"Dear Sir: We are in receipt of your bill in the amount of \$500 to cover your charge for the appraisal report which was submitted to us on September 14, 1942,—"

Q. That was at the date you submitted your appraisal, was it?      A. The first appraisal?

(Testimony of O. W. Cotton)

Q. Yes.

A. The first appraisal was submitted September 14, 1942.

Mr. Crouch:

“—and have transmitted that bill to the Defense Plant Corporation for payment. With reference to your letter of October 3, 1942, wherein you make a reduction in your charge for making an additional detailed appraisal on the properties outlined in your letter, we wish to advise you that you are authorized to proceed with the additional detailed appraisal and report for the sum of \$500, it being understood that the costs of the two reports are not to exceed \$1,000. It must be understood that this appraisal is made in connection with the condemnation proceedings and embraces [877] the area as shown on the key map, Sketch 25, now and to be occupied by our shipyard, and that payment for this work will be made by the Defense Plant Corporation or the U. S. Maritime Commission. And I am of the opinion that this charge will be liquidated under the funds made available for the carrying on of the condemnation proceedings, which funds will be authorized by one or the other of the governmental agencies mentioned above. It is to be understood that the report on the appraisal will be completed within 15 days from date. I trust that this meets with your approval.”

And may the same stipulation be made with regard to this letter?

Mr. Landrum: There is no objection except they have some pencil writings on it.

(Testimony of O. W. Cotton)

Mr. Crouch: You don't care for that circle being erased, do you? Is this Exhibit Z?

The Clerk: Yes; Exhibit Z.

Mr. Crouch: It is a letter from the Tavares Construction Company to Mr. James Roper, Division Engineer of the Defense Plant Corporation, dated October 17, 1942.

"Dear Sir: In accordance with our telephone conversation of October 15th, I wish to advise you that the U. S. Maritime Commission has decided to condemn all property on which facilities are being constructed by us, under agreement of lease, Plancor 407, National City. It is the opinion of all [878] concerned that the rental for use of this real estate is exorbitant and, in order to arrive at a fair price for either rental or acquisition in fee simple, condemnation proceedings are necessary and have been so approved by the U. S. Maritime Commission. In order for a decision to be made to condemn this real estate, it was necessary to employ an appraiser, of recognized ability, to make a preliminary report. Mr. O. W. Cotton, of San Diego, was employed to make this report for a fee of \$500, and his bill has been transmitted to you for payment. In view of the fact that the condemnation proceedings are to be instituted, and in order to present an intelligent case before the court, a detailed appraisal must be made, for which Mr. O. W. Cotton has been employed for the sum of an additional \$500. The total cost for the preliminary and the detailed report is \$1,000. In the interest of expediting the acquisition program and economy and in view of the great need for ships, we have authorized an appraiser to proceed with all



(Testimony of O. W. Cotton)

haste to the end that the property involved may be condemned at the earliest possible date. We respectfully request that you honor Mr. Cotton's invoices."

Q. I was considerably interested yesterday, Mr. Cotton, in what you had to say on the subject of monopoly, and I think that I heard you say, when you were asked by some of counsel, if it were not a fact that all tidelands in California were held subject to a trust, under which cities or the [879] State are prohibited from alienating or selling them, and I think that you said that that was true with only one or two exceptions. Did I hear you correctly?

A. I understand there are several exceptions to that. I am not personally familiar with them.

Q. That is what I was trying to find out about. Those exceptions, Mr. Cotton, were instances where the federal government has condemned and later found no use for the property and sold it? Isn't that the fact?

A. I don't know.

Q. But, if the program that is outlined in these letters that I have read were carried out and the government, pursuant to what is mentioned in these letters, as set forth in Plancor No. 407, had condemned the site acquired by the Maritime Commission or the Defense Plant Corporation, and then, when they had no further use for the building of ships, were to sell the plant and all the lands to the Tavares Construction Company, then the Tavares Construction Company would be under one of those exceptions that you told about?

Mr. Landrum: That is objected to, if the court please. It is not proper cross examination.

The Court: Sustained.

Mr. Crouch: That is all.

(Testimony of O. W. Cotton)

Redirect Examination

Q. By Mr. Landrum: Mr. Cotton, I notice that counsel [880] on the other side of this lawsuit, including the Tavares Construction Company, including the City of National City, and including the San Francisco Bridge Company, all have a copy of your original appraisal of September 14, 1942. Did you notice that?

A. Yes.

Mr. Monroe: I object to that as immaterial.

The Court: Overruled.

Q. By Mr. Landrum: Mr. Cotton, how do you suppose they got it?

Mr. Monroe: I object to that as immaterial.

The Court: Overruled.

The Witness: I delivered several copies to the people that employed me.

Q. By Mr. Landrum: Mr. Cotton, up until you came into this court room to testify for the government of the United States, did either one of those parties, either the San Francisco Bridge Company, the Tavares Construction Company, the City of National City or Carl Johnson, ever state to you they were dissatisfied with that figure and that appraisal? A. No.

Q. Mr. Cotton, counsel has discussed with you the question of costs of a structure, stating to you in the question which he put to you that it cost \$70,000 to dredge this [881] land and a certain amount of money to build that pier. In the appraisal of land, in reaching a conclusion with respect to the fair market value of it, what relationship, if any, does the cost of a structure have to its market value some years later? A. Very little.

Q. Why?

A. In this instance, the City of National City demanded in its letters that the San Francisco Bridge Com-

(Testimony of O. W. Cotton)

pany dredge to 9 feet depth in the channel. I made an endeavor to find out from the Bay Bridge Company what their cost of that dredging was. In reply to my telegram, they would not answer that question. They did state that they dredged to 13 feet but from the fact that the requirement was only 9 feet, it was not possible for me, in the absence of any knowledge of costs, to give them any credit for any more than the 9 feet that was contracted for in the lease.

Q. Mr. Cotton, just to put it to you so I think we will all understand it, if they spent \$2,000,000 to build a sanitarium for mental patients down here where all of these airplanes fly around, do you think it would be worth \$2,000,000 for purposes down there?

A. Apparently not.

Mr. Landrum: That is all.

Mr. Monroe: May I inquire, your Honor? [882]

The Court: Yes, sir.

#### Recross Examination

By Mr. Monroe:

Q. Mr. Cotton, did you give a copy of that appraisal of yours to Mr. Johnson, ever? A. No.

Q. Did you give one to the San Francisco Bridge Company? A. Certainly not.

Q. Did you give one to National City?

A. Certainly not.

Q. You don't expect, then, that they could have complained of what was in something they didn't see, do you?

A. I am not supposing.

Mr. Monroe: That is all.

Mr. Landrum: That is all, Mr. Cotton. Thank you, sir.

Now, Mr. Schmutz, come on up.

GEORGE L. SCHMUTZ,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: George L. Schmutz.

Direct Examination

By Mr. Landrum:

Q. Where do you live, Mr. Schmutz? [883]

A. North Hollywood, California.

Q. How long have you lived there?

A. 25 years.

Q. How old a man are you?

A. 54 in August.

Q. What is your business or profession?

A. I am a licensed real estate broker and an appraiser.

Q. Will you sketch briefly for this court and jury your experience in connection with your real estate brokerage business and also with relation to your appraisals and giving particular reference, Mr. Schmutz, to lands and properties similar in character to those with which we are here concerned?

A. Generally speaking, since coming to California 25 years ago, I have made numerous appraisals for various employers, some of whom are or were the United States of America, the Navy Department, the War Department, the Justice Department, Reconstruction Finance Corporation Mortgage Company, the Defense Plant Corporation, the Federal Works Agency, the Federal Home Loan Bank, and also for the State of California, the Department of



(Testimony of George L. Schmutz)

Finance, the Department of Public Works, the Building and Loan Commissioner, and also I have made appraisals for the Territory of Hawaiï, for the Attorney-General, for the County of Los Angeles, for the City of Los Angeles, the cities of Berevly Hills, Southgate, Long Beach, Lynwood, Glendale, Burbank and others. I have also made appraisals for [884] many private employers, some of which are the Standard Oil Company of California, the Union Oil Company, the General Petroleum Corporation, the Petroleum Securities Corporation, the Title Insurance and Trust Company, the Santa Fe Railway Company, the Union Pacific Railroad, Lockheed Aircraft Corporation, Forest Lawn Memorial Park Association, the Los Angeles Turf Club, the Los Angeles Investment Company, the California Bank, the Capitol Company, the Honolulu Plantation Company at Pearl Harbor, and the Detroit Aircraft Corporation, of Michigan. I am a member of the Los Angeles Realty Board and was chairman of its appraisal committee in the year 1937. I am also a member of the San Diego Realty Board and have been for several years. I am a member of the California Real Estate Association and was chairman of its appraisal division in 1934. I am a member of the National Association of Real Estate Boards and a member of the American Institute of Real Estate Appraisers, the national organization. I was chairman of its education and research committee in 1938. I was its national president in 1940.

Q. Now, Mr. Schmutz, we are particularly interested here in your work here in San Diego. I understand you to say that you are a member of the San Diego Real Estate Board?

A. I am.

(Testimony of George L. Schmutz)

Q. Now, give us some of the particular studies and appraisals that you have made in San Diego and in that parti-[885] cular vicinity.

A. Well, perhaps this may be in and out of San Diego. If I may, first, I will tell you about outside.

Q. Yes; go ahead.

A. I have made an investigation of the Los Angeles Shipbuilding and Drydock Corporation property in Los Angeles Harbor, also the Naval Fueling Wharves 1 and 2 in Los Angeles Harbor, also the Outer Harbor Dock & Wharf Company property in Los Angeles Harbor, also the Kerckhoff-Cuzner Lumber Company property in Los Angeles Harbor. [886]

Q. Wait a minute. Did you find that there was some water-front property privately owned in Los Angeles Harbor that you appraised?

A. Yes, sir, the Kerckhoff-Cuzner Lumber Company property, which I appraised for the Standard Oil Company, who were considering its purchase.

I also appraised the Victory Pier in Long Beach Harbor, which was built by the Army for loading ammunition destined for Pacific Theatre of War, to set the price for sale by the Army to the City of Long Beach.

I have also appraised various privately-owned tidelands.

Q. What are they, now?

A. On San Francisco Bay in and near the City of Richmond.

Q. Go ahead and tell us what they are.

A. Along San Francisco Bay, on the east side of the Bay, near the shipyards at Richmond there were a number of parcels of privately-owned tidelands. I have particular reference to some which I appraised there for the

(Testimony of George L. Schmutz)

Navy in connection with the acquisition of a naval fueling depot at Winehaven.

I have particular reference to one parcel of land which has been available for sale, available for purchase, for the past 15 years, a 100-acre parcel of tidelands, which is situated between the Santa Fe Railroad Company's long pier at Richmond and the pier, the loading pier, of the Standard [887] Oil Company at Richmond. Neither one of those companies were interested enough to pay the taxes or to buy this property. Along in that area are a number of other parcels of tidelands. Some of it is submerged to a depth of two, three or five feet, and some of it has a rather considerable depth right at the shoreline. That is particularly true of a number of properties which were sold about 1942 at Point San Pablo on San Francisco Bay, and a number of industries moved in, fish reduction works, yacht harbors, and others. I made appraisals of those properties and know the prices at which they sold, and at which other properties, similar properties and other tidelands could be purchased.

Q. All right. Go right ahead.

A. I also made appraisals of Winehaven industrial uplands and tidelands on San Francisco Bay adjoining the Standard Oil Company's refinery at Richmond, for fueling naval vessels.

A also made an appraisal of the land occupied by the Todd-Seattle shipyard in Seattle Harbor.

I also made studies of the prices paid for lands for two shipyards in Portland, Oregon; one the Swan Island shipyard; the other, the Vancouver shipyard.

I also made an appraisal of the land occupied by the Brown shipyard in Houston, Texas.

(Testimony of George L. Schmutz)

I made an appraisal of water-front property along the [888] Hudson River in Hoboken, New York, directly across the river from New York City.

As regards this particular area I have made appraisals. Some of the appraisals which I have made in San Diego are as follows:

One, the Thirty-Second Street store-yard of the San Diego Gas and Electric Company, which is right close by National City, in the Navy destroyer base, which is now known as the repair base.

Another property in that same general vicinity at the destroyer base, which was then owned by the San Diego Brewing Company.

At the destroyer base I made an appraisal of lands just below the subject properties, which were purchased by the Rohr Aircraft Corporation in San Diego Bay.

Now, these last three-mentioned appraisals that I made were made in the spring of 1942. The Thirty-Second Street yard at the San Diego destroyer base was property being condemned by the government for the destroyer base, and I made the appraisal for the property-owner, the San Diego Gas and Electric Corporation. The property across the street was owned by the San Diego Brewing Company, and that was condemned by the government for the expansion of the destroyer base. I made that appraisal for the property-owner, the Brewing Corporation, when the Navy took it. [889]

I also made an appraisal of several parcels along Pacific Highway at the Marine Base, which were taken for the Consolidated Parts plant, the parts plant of the Consolidated Aircraft Corporation. I also made an appraisal of property at Mission Bay, which was taken for a hous-



(Testimony of George L. Schmutz)

ing project. I also made an appraisal of the Spear Harbor property at Barnett and Midway, which was taken for a housing project. I also made the original appraisal in 1939, I believe, for the lands taken for the Linda Vista housing project on Camp Kearney Mesa. I also made an appraisal of the land taken for Camp Elliott, the United States Marine Corps base on Camp Kearney Mesa, and appeared in this court as a witness for the property-owners. I also made an appraisal of the land taken, that is, the old Camp Kearney, for the expansion of Camp Elliott out at the original World War I Camp Kearney. I made an appraisal of the land near El Cajon, which was taken for the parachute school which was later established there. I made an appraisal of the privately-owned lands of the Lyon Van & Storage Company and the warehouse in the south industrial district on K Street from Fifth to Sixth Street; also made an appraisal of the Chinese Gardens Cafe at Rosecrans, which was taken for the parts plant of the Consolidated Aircraft Corporation.

Q. Now, Mr. Schmutz, I think that will give us sufficient information. There has been some discussion in this [890] case, sir, with relation to plottage value, or with relation to the fact that there is a large body of land here, consisting of some 96 to 100 acres. Now, in connection with your work throughout the State of California, have you found any industrial plants in Los Angeles, or any place else that you know of, that has that large an acreage? Discuss that with us a moment.

A. As regards size, in the Los Angeles area, for illustration, with possibly one or two exceptions, of which I am aware, the maximum size of land used by any industry is by the tire manufacturing industry. That would be

(Testimony of George L. Schmutz)

Goodyear, Goodrich, Firestone, and the U. S. Tire Company. Those plants range, or the land area is from 30 to 34 acres. Now, as a war measure there may have been built some synthetic rubber plants or styrene plants which may provide slightly more than that, but I think it is reasonable to say that in the Los Angeles industrial area perhaps 99 per cent of all of the land industrially used would comprise, we will say, two acres or less. Unquestionably it would not be as much as five acres for 99 per cent of all the industrial land in the Los Angeles industrial area.

Q. Now, Mr. Schmutz, in connection with your work as an appraiser throughout the country, and in arriving at your conclusions with relation to values of property, what is it that, in your opinion, has the greatest control over [891] the price to be paid?

A. Supply and demand.

Q. Will you discuss that with us just a moment?

A. Well, supply and demand are utility and scarcity. A thing must possess utility before it can have value, and at the same time it must be scarce relative to the supply of it.

Now, for illustration, air has the greatest possible utility, but commands no price because there is more than plenty of it. But, on the other hand, mosquitoes are scarce in the wintertime, but nobody will pay anything for them because they lack the element of utility. So it is whenever a market is surfeited with any particular type of property, and it may be oranges, or apples, or anything else, that the price is low, but whenever the supply is limited relative to the demand for it, the price rises; and as the demand increases without the supply increasing,

(Testimony of George L. Schmutz)

then the price gets greater. So it is the utility and the scarcity relative to the supply and the demand.

Q. Now, going on, did you make a particular study and investigation in order that you might come into this court room to give us your opinion of the fair market value of the land and interests thereon with which we are here concerned? A. Yes, sir.

Q. Will you tell us for whom you made that study? [892] Who hired you?

A. I was employed by the Lands Division of the Department of Justice.

Q. And you are employed by it today, are you not?

A. I am.

Q. Now, when did you start in on it?

A. It was in February of 1945 when I made my appraisal. However, a great deal of the factual data, in fact, I think most of the factual data which I had was gathered by me in the summer of 1942 in connection with other appraisals I was making in the vicinity for the San Diego Gas and Electric Company, for the San Diego Brewing Company, and in connection with the Rohr Aircraft appraisal.

Q. Well, were you generally familiar with this particular land prior to that, in a general way?

A. Yes. In my first—in my assignment, I believe, for the San Diego Gas and Electric Company I heard that just shortly prior to that the City of National City had made a lease to the Tavares Construction Company and, accordingly, I interviewed Mr. Ireland, who was the City Engineer of National City at that time, and Mr. Dale Smith, who was City Clerk. In fact, I saw those

(Testimony of George L. Schmutz)

gentlemen on June 4, 1942, to get information relative to the first of these leases.

Q. Now, will you go ahead and tell us what you did in making your investigation? [893]

A. In addition to talking to these gentlemen for the purpose of finding out the terms and conditions of that first Tavares lease, parcel 1, I also discussed the matter of tideland leases with the Harbor Department of the City of San Diego, got a copy of the map, and all of the tideland lease data, and I have a complete record, I believe. And from the court house records and the title company I acquired data relative to some twenty-five sales of uplands in the general vicinity, and verified the sales price and the conditions from either the seller or the buyer or the broker who negotiated the transaction.

I made an inspection of the subject lands in company with Mr. N. J. Allenger, who at that time was resident plant engineer for the United States Maritime Commission, and from Mr. Allenger I received a set of some fourteen plans and sketches of the land and the improvements thereon, as they had been.

I made an analysis of the sales which had taken place for the purpose of ascertaining the then current price of the uplands. And when I speak of uplands, I mean those lands landward of the main high tideline which can be bought and sold.

I also made a study to ascertain the relationship between the value of the so-called uplands and the value of tidelands, that is, the relationship one to the other, and [894] I made a study of the trend of the value of industrial lands in the San Diego area, metropolitan area, which, of course, would include National City, during the war era.



(Testimony of George L. Schmutz)

I made a classification of the lands involved in this action into three groups for the purpose of my evaluation; those which I call class 1 lands, and give a certain rate per acre, and those are all of the lands which are 500 feet or more distant from the United States bulkhead line, and the second group, class 2, lands which are all lands within 500 feet of the U. S. bulkhead line, and also, the third would be the class 3 lands, which are lands under water, submerged lands.

I calculated the area of the land in each of these classes. I determined from sales the indicated value of these lands, based upon the prices at which other properties were selling, for the purpose of computing the total value of the 96 odd acres involved in this particular action.

Q. Now, Mr. Schmutz,—

A. That is what I did.

Q. Yes. Then I am going to ask you just to tell us, briefly, what I term in the parlance of the street the workings of your mind. Did you have to kind of think of how long the war was going to last?

A. Yes, I made a prediction as to the end of the war. As a matter of fact, I had to make a prediction as to how [895] long that war would last in February of 1942. That was nearly a year before I was engaged in this action, and that was in connection with the valuation of the Santa Anita Racetrack, which was taken as a center for the evacuation of enemy aliens. The Japs were placed in a concentration camp there temporarily while they were being sent away, and in that connection it was necessary to make an estimate as to how long the war would last, for the purpose of making a judgment as to how long that

(Testimony of George L. Schmutz)

racetrack would not operate. I made my estimate and I missed it by four and one-half months, I believe.

In that connection, I did the same here. Of course, I had no reason to change my opinion that the war would be over, that is, that V-J Day would be January, 1946 instead of August, 1945, and that the great demand for these particular lands of National City as a war measure would probably cease at that time, after we reverted from a war economy to a peacetime economy.

Q. Now, Mr. Schmutz, let's get along now to your sales investigation. By the way, while we are on that, what methods do you appraisers use to approach this question of the value of land?

A. There are three conventional approaches to the values estimate, and that which you use, whether you use one or all of them, would depend upon the data available, and that [896] to which you would give the greatest weight would depend upon the nature of the property, and we might say, the reasonableness of the data possessed.

Of course, those three methods,—one is the cost method; second is the comparative method, or method in which value is based upon the sales of similar properties; and the third is the income capitalization method, which is purely a discounting process.

Now, in this particular connection here, it seemed to me, that is, it was my opinion that the most persuasive evidence of the value of this property was the sales method, that is, the price at which other lands had sold or at which other lands could be purchased. However, I did make an estimate of the value that was indicated by cost, that is, if this land was purchased before the government filled it up, and then the money was spent to go ahead

(Testimony of George L. Schmutz)

and to fill the land to the level at which it was at the time I appraised it.

Q. All right, Mr. Schmutz. Now, which one of those methods of approach did you consider to be the best for your purposes, so that you could arrive at a better opinion in this particular instance?

A. The best indicator of value, in my opinion, and the one least subject to wild error would be the comparative method or the method in which I formed an opinion of the value of the property based upon the sales at which other [897] properties had been sold, or at which other properties could be purchased.

Q. All right. Did you find some sales?

A. I did.

Q. Would you tell us, just briefly, about how many and where they were located, without taking too much time, please?

A. Oh, as regards sales, I had fifteen parcels in San Diego in the San Diego city industrial district, four in the National City industrial district, and six in Chula Vista, but of that group of sales there were three in particular which were nearby that were the best indicators that I had.

Q. Now, will you give us those three particular sales, giving us the name of the seller, the name of the buyer, the date of the sale, and just a short description of the property, so we can check it, if we want to?

A. One is the sale I refer to as my Arbitrary Map No. 27. It is southeasterly of 32nd Street in the Sewage Disposal Plant area. The legal description is Block 68, except Lot 33 and except a small triangular parcel at the southwest corner. The land comprises an area of 3.764

(Testimony of George L. Schmutz)

acres. The transaction: the land was sold on October 29, 1940. There were several sellers in there. The purchaser of all of these was the City of San Diego. The price was \$5,235 or \$1,390 per acre.

Mr. Monroe: Now, your Honor please, I move to strike [898] that evidence as improper.

The Court: I think so, the valuation.

Mr. Landrum: Yes.

The Court: You should not read that. I think you should answer the question.

Q. By Mr. Landrum: Yes, Mr. Schmutz, leaving out the price at which it was sold, please, sir.

A. The source of my information was Mr. E. H. Brooks, the right-of-way agent for the City of San Diego.

The second sale—

Mr. Monroe: Now, just a moment, please. We will object to any further testimony as to price on any other sales as immaterial and improper evidence.

Mr. Landrum: Oh, I am sure he will not give it again.

The Court: You had better interrogate him. He may give it if he is just reading it there.

Q. By Mr. Landrum: Mr. Schmutz, the question which I asked you is this: Will you give us these three particular sales, and give us the name of the seller, the name of the buyer, the date of the sale and the legal description, leaving out the price at which you know it was sold.

A. My Arbitrary Map No. 1 in National City is the block bounded by Third, Fourth, Wilson and Harding.



(Testimony of George L. Schmutz)

The legal description is Block 123 in the City of National City. The land is 250 feet by 250 and involves 1.435 acres. There [899] were no improvements. It was sold on May 5, 1941. The seller was H. H. Myers. The buyer was Fred Stall. The source of my information was the Escrow Department of the Bank of America in San Diego.

My Arbitrary Map, National City No. 3 is next. The location is near the southwest corner of the city between 24th and 25th Streets, Cleveland to Harrison Avenues. The legal description is Block 281, National City, except the railroad rights-of-way. The land has an area of 50,275 square feet, being 1.154 acres. There were no improvements. The land was sold on April 1, 1942. The seller was the San Diego and Arizona Eastern Railway Company. The buyer was Plywood Structures, Inc.

Q. Now, Mr. Schmutz, for what purposes did you make this appraisal?

The Court: Which one are you referring to?

Mr. Landrum: The appraisal that he said he made as a result of his investigation. I asked him: For what purpose did you make your investigation to come in here and testify.

The Witness: The purpose of my investigation and subsequent appraisal was to inform the government as to my opinion of the fair market value or the just indemnity to which these parties were entitled.

Q. By Mr. Landrum: All right. What is your understanding of the definition of fair market value? [900]

A. Fair market value is the highest possible estimate, in terms of money, which a property will bring if exposed for sale on the open market, allowing a reasonable time

(Testimony of George L. Schmutz)

to find a purchaser, who buys with knowledge of all the uses to which it is adapted and for which it is capable of being used.

Q. Now, Mr. Schmutz, in the considerations which you used here, did you take into consideration that this particular land with which we are here concerned is tideland, or some of it, and that a fee simple title was going to pass to that assumed purchaser, in your definition of fair market value? A. I did.

Q. From your experience in connection with the buying, handling, selling and appraisal of real estate, and your own personal inspection of the lands with which we are here concerned, known as the Johnson lands, do you have an opinion of the fair market value of that land on November 10, 1942, giving to it all the uses for which, in your opinion, it was suitable or available on November 10, 1942? A. I have.

Q. And what is your opinion of that value, please, sir?

A. \$3,448.

Q. \$3,448. That is the Johnsons. All right.

Mr. Schmutz, from your experience in connection with the buying, selling, and appraisal of real estate, and [901] your own personal inspection and study, of which you have told us, do you have an opinion with relation to the fair market value of the lands known as the National City lands as of November 10, 1942, leaving out, however, any increase or increment in that value due to the expenditure of money upon it by the government of the United States prior to November 10, 1942,—the entire City of National City, including the San Francisco Bridge Company?

A. Yes, sir, I have.

Mr. Landrum: All right.

(Testimony of George L. Schmutz)

Mr. Sloane: Your Honor please, there is one element which is involved in this question, which he has included in a number of other questions, and I am sure counsel will be glad to define and tell us what he refers to in the allegation as to the improvements made by the government, and I think the court and counsel might well instruct or inform the witness that we are referring to improvements as a part of the project, and not as to a previous project, such as the dredging of the channel.

Mr. Landrum: We understand that, your Honor, and it is so intended.

The Court: I think it should be made clear, because there was testimony by one of the witnesses on behalf of the San Francisco Bridge Company, one of the members of the Bridge Company, the corporation, as to dredging that had been [902] done there before this project was contemplated, so far as the record shows.

Q. By Mr. Landrum: As a part of this particular project itself, Mr. Schmutz, leaving out anything that had been done prior by some other work by the government, and also giving the San Francisco Bridge Company credit for whatever it did itself, have you got an opinion on that?       A. I have.

Q. Tell us what it is.

Mr. Monroe: We will object to that as no proper basis because they now state that he has to leave out of consideration anything that was done before this project was commenced, and we submit that is no proper basis.

Mr. Landrum: No, I did not.

The Court: We will have the question read to see if that is the correct interpretation to be placed upon it.

(The record was read.)

(Testimony of George L. Schmutz)

The Court: I think that is sufficient. I think you had better reframe the question and make it one interrogation.

Mr. Landrum: All right, sir.

Q. By Mr. Landrum: Mr. Schmutz, from your experience in the buying, selling and appraisal of real estate and your own personal inspection of this subject property, do you have an opinion with relation to the reasonable and fair market value thereof as of November 10, 1942, giving to it all uses [903] for which, in your opinion, it was suitable or available as of that date, but leaving out therefrom any increase or enhancement thereof by virtue of moneys spent by the government of the United States in the construction of this very project?

A. Yes, I have.

Q. What is that opinion?

A. In my opinion, the fair market value of the property on that day, excluding the improvements such as were placed upon the land and the improvements in the land such as the finished grading and the establishment of sewer lines and water lines and other physical improvements was \$240,258, including the interest of the San Francisco Bridge Company.

Q. All right. Now, in your figure of \$240,258, what do you include for what, in your opinion, was the just compensation for the taking of the leasehold interest of the San Francisco Bridge Company on November 10, 1942?

A. \$28,919.

Mr. Landrum: \$28,919. You may cross-examine, gentlemen.

Mr. Muir: I will refer the examination for the Johnsons, if the court please.



(Testimony of George L. Schmutz)

Cross Examination

By Mr. Monroe:

Q. Mr. Schmutz, you stated you were a member of the San Diego Realty Board? [904] A. I did.

Q. Have you ever resided in San Diego County?

A. I have not.

Q. Have you ever, as a real estate broker, sold land in San Diego County? A. I have not.

Mr. Monroe: I have no further questions.

Mr. Crouch: We have no further questions.

Mr. Sloane: I have no further questions.

Mr. Muir: No further questions.

Mr. Landrum: That is all, Mr. Schmutz. Thank you, sir.

(Witness excused.)

Mr. Landrum: You Honor please, I do not know, but does your Honor intend to take a morning recess?

The Court: Yes. It is about time. We will recess for a few minutes, ladies and gentlemen. Remember the admonition.

(A short recess was taken.) [905]

The Court: All present. Proceed.

Mr. Landrum: If your Honor please, having in mind your Honor's rulings heretofore made under the general objection that I made with relation to the Tavares Construction Company in this case, and reserving any rights that we may have under that previous objection, if we may, we will now proceed with the Tavares Claim in this case. We will call Mr. Shattuck.

CHARLES B. SHATTUCK,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Charles B. Shattuck.

Direct Examination

By Mr. Landrum:

Q. Where do you live, Mr. Shattuck?

A. At 1251 South St. Andrews Place, Los Angeles, California.

Q. How long have you lived in Los Angeles?

A. I was born in Los Angeles.

Q. How old a man are you? A. 47.

Q. What is your business or profession?

A. I am a realtor and a real estate appraiser.

Q. Will you sketch briefly for this court and jury your experience as a realtor and as an appraiser as that experience [906] relates to the question with which we are here concerned, this valuation?

A. I entered the real estate business in Los Angeles in the year 1923. Prior to that time, from 1919 until 1923, I was associated with the Shattuck Construction Company, engaged in building railroads, tunnels, dams and irrigation works. After entering the real estate business, I formed a company known as the Shattuck Company, which does a general real estate brokerage business in the city of Los Angeles. I have confined a good deal of my own personal time to evaluation work, particularly since about 1925. During that time, I have appraised practically all types of real property. In the city of San Diego some of the appraisals which I have made

(Testimony of Charles B. Shattuck)

have been the First National Bank Building and several other business blocks along Fifth Avenue, the U. S. Grant Hotel, the Pickwick Hotel and the Embassy Hotel, and also, in 1939, I believe it was, I appraised the land which was acquired for the Linda Vista Housing Project site, and later on I appraised the lands known as the Old Cherterton Subdivision. I appraised the lands that were acquired for the Marine Base, which fronted on U. S. Highway 101, and that at the time I appraised it were partially submerged tidelands. For the Spreckels Companies, I appraised what is known as their hog ranch.

Q. What do you mean by the "hog ranch"? Can you [907] point it out to us on one of these exhibits?

A. The ranch refers to this parcel of land here at the southerly end and on the westerly side of San Diego Bay.

Q. Is that tideland?

A. It ran out to mean high tide and fronted on water which was in the neighborhood of 1, 2, 3 to 5 feet in depth.

Q. And where is that with relation to the land with which we are here concerned?

A. Directly across the Bay and slightly to the south.

Q. Proceed, please.

A. Also, I appraised for the Spreckels the lands known as Coronado Heights, which is also south. I had better stay down there at the map so I can point these places out. Down at the extreme south end of the Bay, that land ran partially out into the Bay and part of it was submerged land. Then, also for the Spreckels Company, I appraised what is known as the old golf course or country club which fronted along the Spanish Bight, as well as along the Bay. In addition to those properties, I ap-

(Testimony of Charles B. Shattuck)

praised for the United States of America the lands which were acquired for the Naval Destroyed Base, which are in the vicinity of the property that we are considering today, and the work was done in 1942. At that time I went very carefully into the matter of the various leases which the City of San Diego had and its holdings and tidelands in the City of San Diego. [908]

And, likewise, at that time I conducted a very thorough investigation of the sales of lands in the general vicinity of National City and the Destroyer Base. At the time that appraisal was made, much of the land was privately owned, that the government acquired for that Destroyer Base, was submerged or partially submerged land.

Q. Did you say that land was privately owned?

A. Yes, sir; and it was partially submerged land, that is, it was land which, when there was a high tide, had anywhere from one foot to a couple of feet of water on it.

Q. Mr. Shattuck, in connection with your studies and right at this point I am going to ask you whether or not you know of other tidelands in the State of California which are privately owned.

A. I do; yes.

Q. Tell us about them.

A. There are lands, quite a large block of tidelands, at Anaheim Bay, that are privately owned by the Hellman Company and by the Bixby Company, some 1,000 acres or more there at the entrance to Anaheim Bay. They are noticeable when you drive from San Diego to Los Angeles on U. S. Highway 101. They appear to be sort of sloughs and so forth in there and those lands are all submerged lands. Then in the Harbor of Long Beach there are a number of parcels of privately owned land, tidelands, which front directly upon deep water [909]



(Testimony of Charles B. Shattuck)

channels. Then, also, in the San Francisco Bay area, there are a number of parcels of submerged lands which are adjacent to the Bay, which are privately owned. Right here in San Diego there was some land, that was on the northerly side of Mission Bay, which was under private ownership at one time, which was later acquired by the government, however, that is, land which, during periods of high tide, was flooded land. In addition to the appraisals which I made immediately surrounding the Bay, I appraised a good deal of other property in and about San Diego. I appraised all of the lands that were acquired in Pacific Beach for the building of that project out there. I appraised the land up on Otai Mesa in connection with the extension of that air field, and particularly during the war period I did quite a bit of work in and about San Diego for the United States of America and also for various property owners.

Q. Mr. Shattuck, did you ever buy or sell any land in San Diego?

A. Well, I bought a couple of small pieces up on the Mesa for the government but that is the only buying or selling that I have actually done as a broker here in San Diego. My business here in San Diego—I had an office here for a while during the war, when I was doing quite a bit of work here, particularly on the Destroyer Base, but I never had any occasion to try to conduct any brokerage business here in this [910] particular county, though I did in Los Angeles County.

Q. Are you a member of the San Diego Realty Board?

A. I am a non-resident member of the San Diego Realty Board; yes, sir.

(Testimony of Charles B. Shattuck)

Q. Mr. Shattuck, when did you first become familiar with the lands with which we are here concerned, in a general way?

A. I would say in 1942, at the time I was making the appraisal on the original Destroyer Base site. I went down onto this property in this vicinity at that time and have been familiar with it ever since that time.

Q. Now, were you requested to make an appraisal of the fair market value of the leasehold interest here of the Tavares Construction Company and its associates?

A. I was; yes.

Q. Mr. Shattuck, tell this court and jury who asked you to make that appraisal?

A. The Lands Division of the Department of Justice, Mr. Landrum:

Q. Did you do it?           A. I did; yes.

Q. When did you start in on it?

A. On January 28th of 1947.

Q. Is it fair to say that you have been working at that pretty steadily since that time? [911]

A. It is; yes, sir.

Q. Now, Mr. Shattuck, what is the problem which I asked you to consider?

A. You asked me to consider the question of whether or not this lease and option which the Tavares Construction Company had with the Defense Plant Corporation of the United States of America, as of December 23, 1944, had a fair market value and, if so, what that value, in my opinion, was; in other words, what it could have been sold for in the open market to a well-informed purchaser who was fully aware of all the uses and purposes for which the property might be put if they acquired it,

(Testimony of Charles B. Shattuck)

and assuming that a reasonable time was allowed in which to permit the purchaser and the seller to get together, and that neither one was acting under any compulsion to deal, and that was to include not only a consideration of the lease document but also the question of whether or not this option that was in the lease and which, if exercised, would carry with it the site and the machinery and facilities—whether or not that was an element which would be considered by a purchaser and by a seller in reaching a question of whether the price should be one figure or another.

Q. Has anyone ever given you any other instructions than those that I gave you?

A. Absolutely none. [912]

Q. Now, I am going to ask you, Mr. Shattuck, what was the first move that you made when you started this study of this? What did you first consider?

A. I first obtained the lease itself, the document itself, which the property with which I was concerned, as it was the contract, in effect, which would be transferred if the Tavares Construction Company were to exercise its option and later dispose of it, or it was a document under which they had certain rights which this condemnation action was wiping out.

Q. Mr. Shattuck, I show you what is in evidence in this case, a copy of which I understand each member of this jury has, as Exhibit W, and I will ask you to just glance at it and tell us if that is the copy that you started out to study.

A. Yes; it was a copy of this same agreement dated December 27, 1941.

(Testimony of Charles B. Shattuck)

Q. Now, Mr. Shattuck, will you be good enough to tell the court and jury the particular items or particular portions of Exhibit W which you considered? Take that instrument and tell us the studies that you made of it.

A. I studied it carefully paragraph by paragraph, and the first thing I noted in the document was, if the Tavares Construction Company assigned to the Defense Plant Corporation its interest in certain leases which it had previously had with the City of National City, the Defense Plant Cor-[913] poration agreed to purchase those leases, providing the price was satisfactory to the Defense Plant Corporation. Then I noted a number of paragraphs in there which provided for the Tavares Construction Company to proceed to build a shipyard and acquire certain machinery and facilities in the name of and on behalf of the Defense Plant Corporation and with the approval of the Defense Plant Corporation both as to items and as to price. I noted in paragraph Four of the lease that the Defense Plant Corporation agreed to pay for all of the construction costs and aquisition cost of machinery and facilities, subject, however, of course, to the Defense Plant Corporation maintaining checkers and auditors on the job. I noted that in paragraph Five the Tavares Construction Company was to carefully inventory and describe all machinery and facilities purchased or constructed and that same were to be stamped to indicate their ownership by the United States of America. I noted that in any purchase made an officer of the Tavares Construction Company was to certify to the United States of America that the item was necessary and that the price was fair. I noted that the contract was subject to all federal laws that might apply to a contract of this charac-



(Testimony of Charles B. Shattuck)

ter. That is in paragraph Eight. I noted that in paragraph Nine, and this was one particular paragraph that I was interested in, that the United States of America was not to pay for any salaries of officers or the expenses of officers or for overhead, [914] but that the Defense Plant Corporation might, with its own approval, pay the direct expenses of officers or pay for attorney's fees that were necessary, directly with the management of this particular project. I noted in paragraph Ten and the subsequent amendatory documents that were added to the original lease that the rent was fixed on the basis of per ship finished, and that the rent was payable as ships were finished. I noted that in paragraph Eleven of the lease title to the site and all machinery and all facilities was to remain in the Defense Plant Corporation, and that all facilities, machinery and construction works, performed by the Tavares Construction Company on behalf of the Defense Plant Corporation, were to be considered and remain as personal property regardless of the manner in which they might be affixed to the land. I noted in paragraph Twelve that the Defense Plant Corporation agreed to lease to the Tavares Construction Company all of the machinery and facilities and to sublease the site for a period which would end on December 31, 1947, and automatically would extend, if still in effect at that time, to December 31, 1949. This paragraph Twelve also provided that either the Defense Plant Corporation or the Tavares Construction Company should have the privilege of cancelling this particular lease providing it could be shown that the property was no longer needed for the construction of boats for the government. And in paragraph (c) [915] of paragraph Twelve it provided a

(Testimony of Charles B. Shattuck)

method of arbitration in the event there should be any dispute between the Defense Plant Corporation and Tavares as to whether or not this particular site and these facilities were needed for the construction of boats for the government. And it was provided that such arbitration on that particular point, if entered into, should be final and binding upon both parties to the contract. Then paragraph Fourteen, in clause (a), the contract provided that the Defense Plant Corporation could cancel the lease if all or substantially all of the contracts that the Tavares Construction Company had for the construction of boats were cancelled or terminated prior to completion. And in paragraph (b), or clause (b), of paragraph Fourteen, the lease provided that the Defense Plant Corporation could require priority of use of the site and the machinery and the facilities for any other agency of the government, and that the lessee should give such priority and that, if they did not give such priority, the lease could be cancelled, so that it might be transferred to some other department of the government. Then, in clause (c) is also provided that the lease might be cancelled in the event the lessee became insolvent. And in clause (a) it provided that the lease could be cancelled provided the lessee in any manner violated any of the terms or conditions of the lease.

Paragraph Fifteen of the lease provided a method by which, [916] under certain conditions, an option was to be given to the Tavares Construction Company for the purchase of the site and the machinery and the facilities, that is, all of it and not part of it. It provided that this option was to come into effect only under one or two specific conditions, one, provided that the lease was cancelled

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pursuant to paragraph Twelve, that is, where either party established the fact that the site was no longer needed for construction of boats by the government, or, under clause (a) of paragraph Fourteen, where the Defense Plant Corporation cancelled the lease because all or substantially all of the contracts which the Tavares Construction Company had for constructing the boats had been cancelled prior to completion.

Q. Did you consider the question of whether or not that option clause would arise if the termination of the contract was brought about by virtue of the fact that the Defense Plant Corporation had the right to turn the priority in this plant here over to some other branch of the government?

A. Yes; I considered that fact in considering the question of the market value of this particular right which they had, this lease, that was an element of uncertainty or chance that any informed purchaser would have to consider, or if this option was to come into existence, in my opinion, only under one of two conditions, and if neither one of those two conditions came about and the government elected to go ahead [917] under clause (b) of paragraph Fourteen, then they would have no option, as I see it. This paragraph Fifteen further set up and provided that, in the event the option did come into existence, the method by which the price would be calculated. There were two methods. One was in clause (a) under that paragraph and it provided that the price would be the actual cost of the facilities in construction of this shipyard plus 4 per cent, less all rental payments made, plus 4 per cent, or the actual cost of the site and the machinery and the facilities, less fixed and stipulated rates of de-

(Testimony of Charles B. Shattuck)

preciation, as set forth in the paragraph, whichever one of those two methods was the greater. And, based on my analysis, it would be my opinion that they would have to figure the latter of the two methods, that is, shown in paragraph (b), that is, if the option was to come into being, the cost to the Tavares Construction Company would have been the actual cost of acquisition of the site plus the actual cost of the acquisition of the machinery and facilities, less the stipulated rates of depreciation. Then, this paragraph Fifteen also contained a clause that the lessee might, with the consent of the Defense Plant Corporation, during the 90-day option period which was granted, negotiate with them for a part of the machinery or facilities. And it also provided, providing it was lawful for the Defense Plant Corporation to do so, that it would agree not to sell any of the machinery or the [918] facilities to any other person, other than another department of the United States government, for a period of 90 days subsequent to the end of the 90-day option period, without first offering it to the Tavares Construction Company at whatever the best bid price was that they had received. And the Tavares Construction Company had a lay-off or refusal period of 30 days in which to say they would or would not take it. And that was provided, of course, it was lawful for them to do that. In paragraph Sixteen the lessee is required to obtain and keep insurance and pay for all insurance necessary to properly protect the machinery and the facilities. In paragraph Seventeen of the lease the lessee was required to keep and to pay for all necessary public liability and property damage insurance, and agreed to save the Defense Plant Corporation harmless from any claims of that character. In para-



(Testimony of Charles B. Shattuck)

graph Eighteen the lessee is required, under that paragraph, to maintain in good repair all of the machinery and all of the facilities, less, of course, usual and normal wear and tear. Paragraph Nineteen permitted the Tavares Construction Company to use this machinery in connection with any other shipyard that the company might own, providing they first had the approval of the Defense Plant Corporation for such use. Paragraph Twenty required that the lessee pay all taxes that might be assessed by the City of National City and the County of San Diego against any of the machinery or [919] the facilities. Then, there were the usual clauses that they would comply with all of the local and State ordinances and laws. And in paragraph Twenty-two the lease provided that this site and these facilities and this machinery should be used only for the construction of boats for the government and that, if this site or any of the facilities or machinery were to be used for any purpose other than for the construction of boats for the government, the Tavares Construction Company should obtain the written permission of the Defense Plant Corporation for such use. [920]

Paragraph 24 provided that the lessee should not sell, assign or pledge this lease in any manner without having the prior written consent of the Defense Plant Corporation. Also, it provided that the lessee should not sublet either all or any part, or the machinery or the facilities, without the prior written consent of the Defense Plant Corporation.

In paragraph 26 it was provided that if the Defense Plant Corporation transferred its interests to any other department of the government, that all of the rights which

(Testimony of Charles B. Shattuck)

it had under the terms of this agreement were vested then in the United States Maritime Commission.

Then there were the usual clauses about no member of Congress being admitted to any profits or benefits from the operation of the contract, and that representatives of the Defense Plant Corporation might be one and the same as representatives of the United States Maritime Commission. Then it provided the method for giving notices, and so forth.

Q. Did you also have available to you the amendments to Exhibit W?           A. I did.

Q. Not to Exhibit W, but to the original contract?

A. I did, yes.

Q. Just tell the jury, briefly, what the provisions of the amendments were.

A. There were six amendatory documents affixed to the [921] original lease, and they had to do primarily with the alteration of paragraph 10, which first fixed the amount, the total amount that the government was to expend. For instance, in the original lease the total provided to be spent by the Defense Plant Corporation in paragraph 10 was \$404,500, and in the last amendatory 6, I believe it had reached up to in the neighborhood of \$2,700,000, and those amendatory agreements merely changed those two places in the lease, or amended them as the plans of the government changed with reference to the intensity of use of this particular property. In other words, as the war progressed and the yard came into operation, why, they apparently stepped up their program to build more ships, and it cost more money to buy equipment, and so forth, in accomplishing those ends.

(Testimony of Charles B. Shattuck)

Q. And they also increased the amount of rental which was to be paid by reason of the amount the government had put in?

A. That's right. In paragraph 13 the first amount provided for was that they would pay a rental of \$83,327 per boat, as they finished each boat, and by the time they got through they were paying \$127,000 per boat.

Q. At one time it went up to \$140,000?

A. That's right. On the first five boats they amended it to \$140,000. Thereafter it was \$127,000 per boat until they completed 22 boats. [922]

Q. Now, Mr. Shattuck, after you had been handed that contract, what did you next do? Did you go down and view the property?

A. I believe I overlooked one thing. At least, it comes to my mind, that I should mention.

Q. All right.

A. That is this: There was a proviso in the lease which provided that the Tavares Construction Company was to have the free use of the site, and the machinery and the facilities after they had paid sufficient rent to reimburse the government for the entire cost that it had been put to in the creation of this enterprise. However, that free rent was to be given them only for the construction of boats for the government.

Q. Now, did you go down, then, and go on the premises?

A. Yes, I did. I went all over the property again. Of course, it had been considerably changed because the United States Navy was in possession of the property and had spent very large sums of money in additional work there, and many of the buildings which were placed

(Testimony of Charles B. Shattuck)

on this property by the Tavares Construction Company had been either totally removed or partially removed.

Q. All right. Then what further documents or instruments, if any, did you get in order to proceed with this question which was before you? [923]

A. Well, I obtained certain correspondence, letters, and so forth, that had passed back and forth between various departments of the government and the Tavares Construction Company.

Q. By that do you mean that you had available to you what is in evidence in this case as Plaintiff's Exhibit 2, Plaintiff's Exhibit 3, and Plaintiff's Exhibit 4, Mr. Shattuck?

A. Yes. I had read all of those letters to which you refer. In addition to that, there were some other letters that had passed, that were dated subsequent to the date of taking here, but which contained information, for instance, with reference to the amount of taxes that were payable by the Tavares Construction Company on the facilities and on the machinery, and referred to such items as—

Mr. John M. Martin: Just a moment. I object to the witness going into all those matters. Counsel for the government has specifically inquired as to certain documents.

The Court: Yes.

Mr. Landrum: Yes, I think so.

Q. By Mr. Landrum: Now, what I want to get at, did you then begin the study of the problem to be developed by you under sub-section (b) of paragraph 15,



(Testimony of Charles B. Shattuck)

that is, this option proposition? In other words, did you start to figure out the depreciated value on these facilities?

A. Yes. I had to make an estimate as to what, in my [924] opinion, assuming the option had come into being, what the possibilities were of that option having some market value.

Q. What did you do in order to pursue that study?

A. In that connection I obtained the Assets-Property Record of the Defense Plant Corporation, which set forth in detail each item purchased, and a description of it, as well as the actual cost of that item and the time when it was purchased, and from that I had to ascertain from the Defense Plant Corporation how it was classified, because there were three different schedules of depreciation. For instance, buildings, and ways, and docks, and direct improvements to land, and matters of that kind, were to be depreciated at the rate of five per cent per annum. Then there was machinery, which was to be depreciated at the rate of 10 per cent per annum; and then the small hand tools, and matters of that kind, were to be depreciated at the rate of 25 per cent per annum. So I had to classify those different items of personal property and construction, so as to be able to apply the rates of depreciation to the original cost, as required by the terms of the lease agreement,—

Q. Did you arrive at—

A. —and I made a calculation, and arrived at a figure, which resulted in a check against estimates made by the Tavares Construction Company, and which I believe you have stipulated to here in this court room and which is [925] referred to, I believe, as Exhibit Q, which is a tabulation showing each item and showing the depreciated

(Testimony of Charles B. Shattuck)

cost, which would be the option price at which that particular item could be purchased.

Q. In other words, your figures were so close to those that had been reached by Mr. Smith that we just stipulated to it and put this Exhibit in?

A. That is right. My figure was within \$23,000 of his, and on a matter involving better than \$2,000,000, and with a question of whether you had a thing, a particular piece of machinery classified correctly or incorrectly, why, I felt that was as near as we could ever be able to get together.

Q. Yes, all right. Then tell us, Mr. Shattuck, after you had gotten that material together, what further studies did you feel it was necessary for you to make in order to evaluate this Exhibit W?

A. Well, I had to—in connection with the estimate as to whether or not, if this option came into being, it would be marketable at any price, I had to form some conclusion as to the value of that site.

Q. You mean in case you reached a conclusion that the option could come into being?

A. That is right.

Q. Now, what did you do to evaluate that site? [926]

A. Well, in connection with the evaluation of that site, I approached it first from the angle of what was there. In other words, I started out with the land, as I knew it to be; that is, merely tideland or mud flats, prior to the time that any fill or spoil had been placed upon it. I knew from my own knowledge and study of sales of similar mud-flat lands in and about San Diego Bay, what unimproved raw land of that type would command per acre. Then I calculated the amount of spoil that had been

(Testimony of Charles B. Shattuck)

pumped on to this site at the time the main channel was dredged down San Diego Bay, when they deepened that main channel to 30 feet, and that raised the elevation of this land, the submerged land to spoil-filled ground of, we will say, approximately 10 feet elevation.

Then that was the condition, in my opinion, in which this site was before the Tavares Construction Company entered upon it, except for the work which had been done by the San Francisco Bridge Company on parcel No. 7, I believe it is on the exhibit.

Q. Now, of course, you understood, did you not, that in addition to the particular lands with which we are here concerned in the trial of this action, there are three other parcels, parcels 4, 10 and 11, do you not?

A. Yes, that's right, but in this particular problem which I am faced with, I am not concerned with them except they are included as a part of this whole site. In other [927] words, there is 100.32 acres all together that I am concerned with, and some of them were disposed of by settlement.

Q. Yes. And you knew what the government had to pay for that?

A. Yes, I was familiar with the amount the government had to pay for that.

Mr. Landrum: All right. Does your Honor wish to take the noon recess?

The Court: Yes. Two o'clock, ladies and gentlemen. Remember the admonition and keep its terms inviolate.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock P. M. of the same day.) [928]







No. 11820

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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TAVARES CONSTRUCTION COMPANY, INC., a  
corporation, CONCRETE SHIP CONSTRUCTORS,  
a joint venture, STROUD-SEABROOK, a copartner-  
ship, LLOYD S. STROUD, R. S. SEABROOK,  
C. M. ELLIOTT, CARLOS TAVARES, HENRY  
M. PAGE and DON F. GATES,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

## TRANSCRIPT OF RECORD

(In Four Volumes)

VOLUME IV

(Pages 1109 to 1457, Inclusive)

Upon Appeal From the District Court of the United States  
for the Southern District of California  
Southern Division

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**FILED**

**MAR 12 1948**

**PAUL P. O'BRIEN. CLERK**



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Upon Appeal From the District Court of the United States  
for the Southern District of California  
Southern Division

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San Diego, California, Tuesday, February 25, 1947,  
2:00 P. M.

The Court: All present. Proceed.

CHARLES B. SHATTUCK,

called as a witness by and on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination (Resumed)

By Mr. Landrum:

Q. Mr. Shattuck, I believe at the time of the noon recess you had just begun your discussion with us as to one of the problems which confronted you in your investigation or determination of the value which might have to be paid by the government for this land in case the option were exercised. Before you go into that for us, will you tell us, just briefly, just what your investigation and studies were you made or what information you had available to arrive at your conclusion with relation to the value of the land?

A. I had, as I testified before, previously, made an extensive investigation of the prices at which land had sold in the vicinity of the Destroyer Base and in the vicinity of National City. And I, likewise, had made an investigation of the leases on various tidelands along San Diego Bay. And, in addition to that, I had some experience with submerged lands at the time I had appraised the Marine Base. [929]

Q. Now, will you go ahead?

A. That information, of course, I had in my mind at the time I was making this estimate of the condition of the land as it was back in 1942, at the time the Tavares

(Testimony of Charles B. Shattuck)

Construction Company assigned its two leases to the Defense Plant Corporation and they commenced the construction of this shipyard. And in that connection, I figured that that land at that time was probably worth about \$215,000.

Q. That is, you first reached a conclusion as to the valuation of this land that the land was worth \$215,000 in 1942?

A. That is, before the construction of the shipyard was commenced, and thereafter, as shown in Exhibit Q, there are certain items, which were items of construction and expense, that were incurred by the Tavares Construction Company and paid for by the Defense Plant Corporation, which became improvements to this site in December of 1944. And in that connection, I call attention to the following items that are shown in Exhibit Q—

Q. That is the exhibit which is in evidence in this case?

A. That is right; yes. That is, clearing and dredging the roads, grading, bulkheads, spur tracks, sewers, telephone lines, water lines and air lines and power and light. I took all of those items, which totaled \$468,752, to create an [930] improved piece of harbor land such as was there in December of 1944, and upon which the shipyard itself was constructed. In other words, they started out with raw land and wound up with a piece of improved land, which would indicate from a summation or cost point that the land, as of December 23, 1944, as improved and after the government expended this money, was then worth in round figures \$720,000, about \$11,500 an acre, or about 26 cents a square foot. [931]

(Testimony of Charles B. Shattuck)

Q. That is after this amount of money had been spent?

A. After the government had spent this money.

Now, then, my next consideration was, in considering the question of whether this lease and option of the Tavares Construction Company had a value in the market, was to determine what the probable price was that the Tavares Construction Company would have to pay, assuming that option would come into being, and as near as I can figure it, because it was unknown exactly what price they would have to pay for the land, because it was being condemned and, therefore, I had to rely on an estimate of value, which I made myself, it would appear they would have to pay right in the neighborhood of \$2,400,000, which would be the probable option price which they would have had to pay the government, assuming they had the right to exercise that option.

The next question I was interested in investigating was what, in the open market on that date, would have been the most likely price a well-informed person would have paid for the site, the machinery and these facilities, because if in the open market one would not pay \$2,400,000, then that option could have no value in the open market, because there would be no profit on it. I made an estimate in that regard, and in considering that I had to go back and consider what this machinery and what these facilities were like, and to what extent they had been used, and to form an opinion as to whether [932] or not the arbitrary rates of depreciation which had been set up in the contract itself reflected what was the actual economic situation of the property in the open market.



(Testimony of Charles B. Shattuck)

That is, arbitrary depreciation is one thing. Actual depreciation and obsolescence in the market is another.

For instance, and by way of illustration, there are four wet docks that were created. Assuming the condition where there was no war involved and we were back on a peacetime economy, it is my opinion there would certainly be no use for four wet docks in a city the size of San Diego. There would possibly conceivably be use for one, so it is conceivable that an informed buyer, who was figuring on the use of the property for industrial purposes, would be willing to pay the full cost of one wet dock; in other words, he would make some allowance for that. I would also take into consideration the fact that most of this equipment and machinery had been used probably seven days a week and maybe as much as 20 hours a day; in other words, practically constantly during the war, because they were working all the time.

Q. Now, I believe you said in that connection that you had, for your information, the letter from Mr. Eisenman, which I believe is in evidence in this case as Exhibit 4, did you not?           A. Yes.

Q. And what did you find in that letter with relation [933] to this depreciation?

A. Well, it seems to me that in that letter the remark was made to the effect that the yard had been used, very heavily used, and, in effect, practically the full use value of the equipment had already been used up, and that is an item I think that any informed buyer would have carefully considered. They would have gone carefully over that batching plant to make sure as to just what condition that was in, and so, taking all those things into consideration, it was my conclusion that in the open market

(Testimony of Charles B. Shattuck)

this particular piece of land on the 23rd day of December, 1944, and the machinery and equipment, as a unit, would not have had a market value in excess of about \$1,985,000. And that being the case, it was my conclusion that the option itself, even assuming it came into being, had no market price which it could command, because it would cost one more to obtain it from the United States of America than it actually would be worth in the market.

Q. Now, let's take up the lease portion of this Exhibit W. You understood that it contained some sort of a provision with relation to their having a lease on it up until 1947, with an option for an additional two years?

A. That is right.

Q. What did your studies develop with relation to their leasehold interest? [934]

A. With relation to the leasehold interest, it was my opinion that the terms of it were very uncertain and conjectural, so far as any possible purchaser was concerned. In other words, in the first place, it was not assignable, they could not pledge it or sell it without the consent of the Defense Plant Corporation, and the country was involved in war, where the government itself needed those kinds of facilities, and, therefore, it appeared doubtful that such a consent could be obtained.

Likewise the lease provided that this site, and this yard, and these facilities could only be used for the construction of boats for the government, and that if at any time it was not so used, the government had an option under paragraph (b) of paragraph 14 to transfer these facilities to any other department of the government, and if it elected, if the government should elect to do so, the

(Testimony of Charles B. Shattuck)

lease could be canceled and no option could be had, and, therefore, you might say that the person who had this lease was merely there at the will of the government.

Q. You have heard some discussion here with relation to their having a right to use that rent-free, have you not?       A. Yes.

Q. What did you find out with relation to that?

A. Well, from some correspondence which I had, and which came to my attention,— [935]

Q. That is this Exhibit 4 in this case?

A. I believe that is the exhibit number, yes.

Q. All right.

A. It is indicated there that they had reached an agreement, apparently, as to the rental that would be charged where the facilities and the yard were used for private work, which was set at the rate of 10 cents a man-hour, and I assumed, in analyzing the question of whether the lease and option had any value in the market, that if this yard were to be used for private work of any kind, that there would be a very substantial rental that would have to be paid, and that if they were not building boats for the government and if they didn't have private work, why, under the terms of the lease the lessee was still obligated to pay the insurance, to pay the taxes, to pay the upkeep, and to maintain the property, which would amount, in my opinion, to a very considerable sum of money, from the standpoint of expense, and those are the matters that I considered.

Q. In other words, it is your understanding of Exhibit W that they only had the use of the yard rent-free when they were constructing boats for the government?

A. Yes.

(Testimony of Charles B. Shattuck)

Q. Now, did you ascertain the extent of their further obligations to the government to construct boats?

A. Well, my information that I uncovered was that [936] they had practically completed their contracts, they had two boats that were yet to be completed, that is, as of December, 1944, and that apparently their work in that regard was tapering off. Also in—I forget which that exhibit number is,—but referring again to one of those letters, and I believe I will get the number of it—anyway, in one of those letters it was indicated by the Tavares Construction Company that they had used some 7,000,000 man-hours of labor in 1943 and that had decreased to an estimated number of man-hours in 1944 of only 2,000,000 man-hours, which shows that only a very small amount of work, as compared with the previous year, was done, and I think that an informed person, thinking about buying a lease and option of this kind involving a shipyard of this character, would have certainly given serious consideration to that fact. [937]

Q. Now, Mr. Shattuck, in your study of Exhibit W, which recites, at the top, "Plancor 407," did you find any provision in there with relation to the consideration which the Tavares Construction Company gave for that agreement? Do you find in there anything about their going to have a supervision fee?

A. No; there was nothing in that agreement that I found with reference to the Tavares Construction Company being allowed anything for a supervision fee.

Q. Now, let me ask you whether or not, from your experience that you have given us here in the general real estate and appraisal business and your own personal investigation upon these lands and your own personal



(Testimony of Charles B. Shattuck)

studies, you have an opinion with relation to the market value of the interest of the Tavares Construction Company and associates, which they have in this action by virtue of the so-called leasehold interest, coupled with an option, known in this case as Exhibit W.

A. Yes; I have an opinion.

Q. Tell this court and jury what it is.

A. In my opinion, it was zero, that is, nothing.

Q. Mr. Shattuck, just sketch briefly for us your reasons, other than those that you have given us, for expressing the opinion that that lease couldn't be sold on the open market for anything.

A. Well, it is my opinion that the whole thing was too [938] speculative and conjectural; that there was no assurance there for any possible purchaser that he was going to be allowed to utilize this property because of the various provisions of the lease itself or the document itself. And, further, it was my opinion that the option was of no particular value because of the reason that I have already expressed; it would cost more than you could realize out of it.

Q. Did you analyze that Exhibit W from the standpoint of whether or not if that option would ever come into being, a purchaser would ever even consider that?

A. Yes; I think they would have and I based that information which came to my attention particularly through this series of letters by which it was indicated, prior to December 23, 1944, that the option wouldn't come into being because the Navy had already pretty strongly indicated its intention not to take it over and, therefore, there was practically no likelihood, in my opinion, of that option ever coming into being. Appar-

(Testimony of Charles B. Shattuck)

ently, the government was about to proceed under its rights under Section (b) of Paragraph Fourteen. The government reserved to itself a right to transfer this site and these facilities and this machinery to any other department of the government if it needed it and, apparently, it elected to do that. And I think a purchaser, in considering this option, would have investigated all of those things and given very careful consideration to them, [939] and I think he would have reached the conclusion that it was worth nothing. And that is the opinion I reached.

Mr. Landrum: All right, gentlemen. You may cross examine Mr. Shattuck.

### Cross Examination

By Mr. Monroe:

Q. Mr. Shattuck, I was interested in your statements about privately owned tidelands and I wondered if you and I mean the same thing when we talk about tidelands. Do you have reference to that land which lies between the mean high tide line as established by the Army Engineers and the pierhead line? A. Not necessarily.

Q. Well, that is what I wanted to be sure of. I wanted to know whether we were talking about the same thing. I think you mentioned something of some lands either in the Bay or around Coronado as being submerged lands or something of that sort. What did you refer to?

A. I might point out on Exhibit K the Coronado Heights land which I appraised for the Spreckles Company. There was a good deal of land on the easterly shore of that upland which, during high tide, was covered with water, and the land itself extended out to the mean

(Testimony of Charles B. Shattuck)

high tide line, to the edge of the Bay. The same thing was true on some portions of the hog ranch property which I appraised for Spreckles. The actual [940] ownership of the land extended to the mean high tide line, which would be the same as the bulkhead and pierhead line. Certain portions of that ownership, however, were such a low elevation that at high tide they were covered by water from the Bay. Likewise, the same thing was true of much of the land that was in the Destroyed Base before that fill was made out there. In other words, there were certain sloughs and so forth that extended back toward the Bay and, during periods of high tide, that water ran in and covered over much of those lands, which you might say were mud flats, referred to as tidal flats and frequently referred to as tidelands, though perhaps, technically, not tidelands in the sense you are thinking about as being lands between the bulkhead and the pierhead line.

Q. I was perhaps being a bit technical, but the lands which you referred to, then, were lands which went to the mean high tide line? A. That is right.

Q. And what we have spoken of as the tidelands which are referred to in the statutes relative to State tidelands. They start at that point and go out to the pierhead line, is that right?

A. In most cases, that is true. In some cases, that is not true. For instance, take in the Los Angeles Harbor Area, where they established the Inner Bay Exception Line. That [941] was a line that was adjudicated and left certain lands in private hands between that adjudicated line and the old high tide line, which were at one time actually tidelands in the sense that you are thinking about,

(Testimony of Charles B. Shattuck)

and those are lands that are in private ownership. I just appraised one piece for the Bannings, that the City of Los Angeles was buying, at the west end of the West Slip in the West Basin, which was very definitely tideland.

Q. Then, there was nothing that you had reference to around San Diego Bay that was outside of the mean high tide line, that is, on the water side of it?

A. No; I think there was nothing that, you might say, was seaward of the bulkhead line or the mean high tide line. However, along the westerly side of San Diego Bay, there at Coronado Heights and on the hog ranch and also on the Coronado golf course land, on the Bight and on the Bay, the mean high tide line and the bulkhead line and the pierhead line are all the same until such time as the Army Engineers cause some realignment to be made.

Q. What you mean is that there hasn't been any pierhead line established, is that right?

A. That is right. In other words, they haven't dredged in there yet and it is virgin territory and it is impossible to tell at this time where they will establish those lines.

Q. Those pieces that you have referred to are in west, [942] near the deep water channel?

A. They are as near the deep water channel as the subject property in so far as the water which is immediately adjacent to them is concerned. What I have reference to, in order to make myself clear, is that the water, which is known as Area A of the subject property, was actually shallow water, or it was at least in 1942, and the same thing is true with water about the same depth and adjacent to the old hog ranch, and the same thing was true along the northerly side here of the land, which was



(Testimony of Charles B. Shattuck)

a portion of the old Coronado golf course. In other words, they all required a certain amount of dredging before they could be used for shipping.

Q. You have mentioned something about some land to the north side of Mission Bay. To what land do you have reference?

A. I had reference there to a piece of ground, that used to belong to a party here by the name of Nunn, as I recall it. It is in the neighborhood of something like 100 acres. That was land which, during periods of high tide, would be flooded by the tidewater. However, that land was all landward of the mean high tide line.

Q. Then, that is not tideland as we have used the term here?

A. Not tidelands in the technical sense that you are thinking of and as lying between the bulkhead and pierhead [943] line.

Q. Now, do you know of any lands between the mean high tide line and the pierhead line, fronting on deep water, that was salable in 1942?

A. That was salable in 1942?

Q. Yes. A. Yes; I think so.

Q. Well, what?

A. I think that the Banning piece on the west slip of the West Basin in Los Angeles was available in 1942.

Q. How big a piece was it?

A. My recollection of it offhand was that it was about in the neighborhood of 20 acres.

Q. Now, was that between the mean high tide line and the pierhead line? A. Yes; it was.

Q. And that was in private ownership?

A. Yes; it was.

(Testimony of Charles B. Shattuck)

Q. And when did it become in private ownership?

A. At the time they established the Inner Bay Exception Line in the Harbor of Los Angeles.

Q. That is, in re-establishing lines, that was a piece that had theretofore theoretically been inside the mean high tide line and was found to be outside, is that right?

A. Yes, sir. In other words, frequently in a bay they [944] adjudicate or change the mean high tide line and, if someone, perchance, happens to have a piece of property that is in the right location, he becomes the owner of it.

Q. What was that piece used for?

A. That piece, in 1942, was not in use. It was in private ownership. But it was harbor land available for use.

Q. Do you know of any other piece at that time?

A. Yes; there were other lands that were lands which had been tidelands. The site of the Richfield and Rio Grande Oil Company terminal in Long Beach Harbor is another piece of privately-owned tideland.

Q. How big is that?

A. I don't recall offhand. My recollection is probably five acres.

Q. Do you recollect any others offhand?

A. Well, to give you specifically the piece, it is rather difficult for me to do. I know that in the San Francisco Bay area there are quite a few parcels of land there, that run out to fairly deep water, that are privately owned, but I cannot give you the exact location of this property.

Q. You wouldn't be able to say whether those pieces actually went out to the pierhead line or not, however?

A. I believe in those particular locations the pierhead [945] lines have not yet been established.

(Testimony of Charles B. Shattuck)

Q. Let's figure that just a moment. Let's take a situation where say you and I own a piece of land that goes down to the mean high tide line and may be partially submerged, and the bulkhead and the pierhead line have not been established, and along comes the Engineers and establish a bulkhead line out quite a ways, and out a little farther they establish the pierhead line, and then they come along and dredge and fill in between the bulkhead line and the mean high tide line. You are not along on the ocean front, are you?

A. No. But you are in close proximity to it. And in that situation you might not be any different than you are on these lands we are talking about here, where you are back of the bulkhead line, where your property extends around 1400 feet at a maximum back of the bulkhead line. So you are quite a distance from the water there, too. So it really doesn't make a great deal of difference. The fact that you are in close proximity and where you can get out to the water is the thing that is important.

Q. The subject lands, however, do run out to the pierhead line?           A. That is true.

Q. And between the bulkhead line and the pierhead line they can't fill? [946]

A. Between the bulkhead line and the pierhead line they can't do anything without the okay of the United States Army Engineers. That is like a public highway.

Q. I am not sure that I understood you, and correct me if I didn't, as to the status, as you understand the land to be, of your first valuation. My recollection of what you said wasn't too clear. Were you assuming that

(Testimony of Charles B. Shattuck)

at the time of your first valuation, when you gave the figure of \$251,000, that land was filled?

A. Yes, sir; it was filled back of the bulkhead line.

Q. That was what I wasn't clear on. In other words, you understood the fact to be that the filling of the land itself was some time prior to the Tavares contract?

A. That is correct; that land was filled from the spoil that was dredged from the main channel at the time it was deepened. And at the time I took that into consideration, in 1942. In other words, before Tavares started in on this construction work on this shipyard, Parcel A was not dredged except for the dredging that had been done by the San Francisco Bridge Company. But the land back of the bulkhead line had been filled with this spoil from the main channel.

Q. That filling in and dredging of the main channel was in 1938, was it not? A. That is right.

Q. And that was at the time they made the deal between [947] National City and the government and gave the government 90 some acres of land, and the government didn't dredge it, is that right?

A. As to those facts, I can't testify because I am not familiar with them.

Q. Anyway, it was 1938?

A. Yes, sir; that is right. It was somewhere in that neighborhood. And this land back of the bulkhead line was what you would call rough filled.

Q. In any event, in making your valuation, you did not eliminate that filling but took it into consideration?

A. Oh, no.



(Testimony of Charles B. Shattuck)

Q. In other words, you took the land just as it was, then?

A. That is right. Without the roads, without the bulkheads, without the sewers, without the water, without the lights and without the power, it was just a raw piece of, you might say, harbor land that was yet to be developed. [948]

Q. So you eliminated from that figure any improvements that the San Francisco Bridge Company put on it?

A. That's right. I testified that it was my opinion that this land in 1942 had a value of \$251,000, exclusive of the work—

Q. I see.

A. —of the San Francisco Bridge Company, but including the spoil or fill that was placed upon the land back of the bulkhead line taken from the main channel at the time it was dredged.

Q. You have testified that at some time or other in your investigation you found that a portion of these improvements, as they are indicated on this model here, had been removed? A. No, I don't think I testified—

Q. I thought you stated that at some time or other you found, in making your observations, that the Navy had then taken over and that a part, at least, of the improvements had been removed?

A. Oh, yes, I know what you are referring to now. Yes, that is true, that at the time I went to look at the property again, which was a few weeks ago, the Navy was in possession and had made considerable changes so that if one went there today they would not have found the picture as indicated by this model. [949]

Q. Did you know when the dismantling of the improvements as shown on here was started?

(Testimony of Charles B. Shattuck)

Mr. Landrum: Just a moment. That is objected to, if the court please. We are concerned here, in so far as counsel's clients are concerned, with the valuation on November 10, 1942, so it does not make any difference what occurred subsequent to that time. As to Tavares, it is December 23, 1944. I feel it is not proper to go into anything the Navy has done subsequent to that time.

The Court: Objection sustained.

Mr. Monroe: That is all.

Mr. John M. Martin: If the court please,—

The Court: Yes.

Q. By Mr. John M. Martin: Mr. Shattuck, had the United States Government entertained on the 23rd day of December, 1944, the same opinion that you have expressed from the witness stand as to the value—

The Court: Just a moment.

Mr. John M. Martin: Will you read as far as I have gone?

(Portion of question read.)

Mr. John M. Martin: May I just start my question anew, your Honor?

The Court: Yes, start it again, Mr. Martin, and we will proceed with this room this way for a few minutes. We want the air, but we must conduct the proceedings in court so that [950] they will be intelligible. Leave the windows open for a while, and if there is not much activity in the air we can have the benefit of the fresh air. Otherwise, we will have to close them.

Q. By Mr. John M. Martin: Mr. Shattuck, had the United States government on the 23rd day of December, 1944, been of the same opinion as that which you have just expressed from the witness stand relative to the fair market value of the lease and option rights held by Con-

(Testimony of Charles B. Shattuck)

crete Ship Constructors, do you know of any reason why they would have thought it necessary to condemn in this action, under date of December 23, 1944, the lease and option then held by Concrete Ship Constructors?

A. Yes. I think that would be required, to include the Tavares Construction Company as a defendant in the action because they had an apparent interest in the property.

Q. Why couldn't they, under your understanding of this lease, merely have notified the Concrete Ship Constructors that they intended to exercise their right of priority that you have discussed at length, as set forth in the lease?

A. Well, of course, that goes into the realm of speculation there, as to why they did. They elected to condemn instead of exercising their rights under paragraph (b). It would appear from the correspondence that they desired to exercise their right under paragraph (b), but apparently were [951] resisted by the Tavares Construction Company, so they elected to condemn. That is the way I would look at it.

Q. So it is your understanding that under the lease the government had a right, through exercising its priority rights therein granted, to merely take over and use this property, and thereby end and terminate all rights of Concrete Ship Constructors?

A. I don't think there is any question about it.

Q. It is upon that understanding of the agreement that you have based your testimony in this case?

A. No, not at all. That is just one of the elements. In other words, it was my opinion that any informed purchaser would have carefully considered every clause of

(Testimony of Charles B. Shattuck)

that lease, as well as the property, the machinery and facilities, they would have looked at it from every angle, and from any angle they looked at it, I think they would come back to the same conclusion, that they would pay nothing for it.

Q. You don't think it would have made any difference to a purchaser if you, as a broker endeavoring to sell the lease and option, had calculated the fair market value as of January 1, 1950, and endeavored to explain to a prospective purchaser the fact that he had the right to purchase on January 1, 1950, and that that was one right that the government could not preclude him from exercising, no matter what kind of a notice they served? Is that in accordance with [952] your understanding?

A. No, I never read anything like that in the lease, that they had a right to buy the lease on January 1, 1950.

Q. You read in the lease under paragraph 12, that was granted for a term of years that was to expire or terminate on December 31, 1949, with an automatic option for renewal on December 31, 1949?

A. I think you are mixed up there, counsel. The lease provides—

Q. Will you turn to paragraph 12, please?

A. The lease provides that the term should end on December 31, 1947, and be automatically renewed until December 31, 1949, and the lease further provided in paragraph 12 that it could be canceled by either party, providing the property was no longer needed for the construction of boats for the government, and there is set up in paragraph 12 a method of arbitration for settlement of that question if there was any difference of opinion between the parties, as to whether the property



(Testimony of Charles B. Shattuck)

was needed for construction of boats for the government, and it also provided in paragraph 14 in clause (a) that the government itself could cancel provided the contracts to build ships by Tavares had been substantially completed, or provided it were terminated before they were substantially completed; and it also provided in paragraph (b) of paragraph 14 that if the government required priority [953] for this site, machinery and facilities for its self or any other branch of the government, it could cancel this lease.

Q. Don't you think we might reconcile our ideas a little more readily if we stick to the one question of priority until we have finished with that question? This is a rather voluminous agreement, and I want you to discuss all of its terms, but for the moment let us talk about the right accorded the government of priority, and see if you and I have the same understanding as to what the lease says on the subject of priority.

Is it your understanding that if the government on December 23, 1944, had said, "The government will now exercise its rights to priority use of this lease," that that action on the part of the government would have ended all rights of the Concrete Ship Constructors under this lease?

A. So far as occupying and using these facilities were concerned, yes.

Q. As you read this lease, when the date December 31, 1947 was reached, commencing in paragraph 12,—by the way, do you have a copy of this lease, Mr. Shattuck?

A. I have an outline of it here, so that I am pretty familiar with it.

The Court: You had better take this copy.

(Testimony of Charles B. Shattuck)

Mr. John M. Martin: I do not like to deprive the court of its copy. [954]

The Court: That is all right.

The Witness: I am familiar with it.

Q. By Mr. John M. Martin: I am handing the witness a copy of Exhibit W. Now, directing your attention to paragraph 12, where it states:

“TWELVE: Subject to termination upon the terms hereinafter in this paragraph TWELVE provided, Defense Corporation hereby agrees to sublease the Site and to lease the Facilities and Machinery to be acquired hereunder, and does hereby sublease the Site, and leases the Facilities and Machinery to be acquired hereunder, to Lessee and Lessee does hereby lease and sublease the same from Defense Corporation for a term ending December 31, 1947, which term, upon its expiration, shall be automatically extended, subject to similar termination for an additional period ending December 31, 1949.”

Now, is it your understanding that had no condemnation been filed and had no notice been served by either party that upon the expiration of the lease there, the first period, December 31, 1947, that Concrete Ship Constructors could have on the first day of January, 1948, elected to purchase? [955]

A. No, they certainly could not; not under that.

Q. And is it your understanding that upon the expiration of the term ending December 31, 1949, that the lessee could on January 1, 1950, have elected to purchase?

A. No, he could not; not in my opinion.

(Testimony of Charles B. Shattuck)

Q. You did not understand, and do not understand now, that the lessee had any such right?

A. No, he had only a right to purchase that equipment, in my opinion, under two conditions; one, that the lease was cancelled under Paragraph Twelve or, two, that it was cancelled under clause (a) of Paragraph Fourteen. Otherwise, they had no option.

Q. If that be your understanding, then I direct your attention to Paragraph Fifteen of Exhibit W, which states, "Upon the expiration or termination of this lease or extension thereof pursuant to Paragraph Twelve hereof,"—now, just stop for a moment with the portion I have read. Is the date, December 31, 1947, to which I have directed your attention in Paragraph Twelve an expiration date within the meaning of the first sentence of Paragraph Fifteen?

A. I think that the word "termination" there refers to the termination or cancellation of the lease pursuant to that paragraph.

Q. I direct your attention again to this copy of the lease, and I wish you would take it, if you don't mind, and I [956] direct your attention to the meaning of the word "expiration" as used in Paragraph Fifteen:

"Upon the expiration or termination of this lease,"—

A. "—pursuant to Paragraph TWELVE."

Q. Yes.           A. Yes.

Q. Paragraph Twelve provided, did it not, two expiration dates, one December 31, 1947, and a second, December 31, 1949?           A. That is right.

Q. Both of those dates, as you understand it, were expiration dates?           A. That's right.

(Testimony of Charles B. Shattuck)

Q. So that upon the occurrence of either one of those dates, the option under Paragraph Fifteen would have come into being?

A. Not according to my understanding, no.

Q. Upon what do you base any contrary understanding?

A. On the fact that these facilities are owned by the United States of America, and that it reserved to itself the right to transfer these facilities, this site and this machinery, to any other branch of the government, if it needed the priority for same, and that it wasn't giving an option to Tavares except under two conditions.

Q. Now, the priority provision that you speak of is in [957] Paragraph Fourteen, so I direct your attention to Paragraph Fourteen of the lease, which reads in part:

"Defense Corporation, by notice in writing with the approval of the Maritime Commission noted thereon, may, in addition to all other rights with reference to termination under paragraph TWELVE hereof, cancel this lease or extension thereof, in the event (a) all or substantially all of Lessee's contracts with the Government, at any time outstanding, for the construction of concrete barges and other boats shall be terminated or cancelled prior to completion, or (b) the Government shall request priority for itself or others with respect to the use of the facilities to be provided hereunder and Lessee shall fail or refuse to give such priority."

Is it your understanding that in the event lessee gave such priority pursuant to such a request, so that the lessee was not in default in that respect, that nevertheless the lease ended merely by virtue of the request for priority?



(Testimony of Charles B. Shattuck)

A. Well, if they made such a request, so far as Tavares Construction Company was concerned, they would be out.

Q. Well, now, let's follow that along. Upon what do you base that conclusion? You say they would be out. They would still have the right to exercise their option on either January 1, 1948, or January 1, 1950, would they not? [958]

A. Not the way I would read it.

Q. Why not? That is what I am trying to get together on with you, Mr. Shattuck. Will you explain to me why?

A. Well, it may be that your question of why illustrates why I think this lease, coupled with an option has no price in the open market, for the reason that it is so conjectural and subject to so many interpretations and is so speculative that I don't believe any informed purchaser would dare to buy it. In other words, I apparently read and look at it in one way as a layman, and as a realtor, and as one who has to analyze leases, for one thing, from the standpoint of the fellow who is going to operate under them; and you, apparently, read it in some other way as an attorney, and perhaps if some other lawyer read it, he may read it some other way, and so you get into a law suit, and when you talk about a price on the market, nobody wants to buy a law suit, and so nobody wants to buy it at any price.

Q. Then point out to me any provision in this case where there is not set forth in plain English language the rights of the parties.

A. Well, I think that I can read English, and I have carefully reread this lease dozens of times, and apparently you have, too, and apparently get a different interpretation on the meaning of certain words.

(Testimony of Charles B. Shattuck)

Q. I am trying, Mr. Shattuck, to get before the jury [959] wherein we differ, if I can, and I solicit your aid in that respect.

A. I will be very glad to help you, sir.

Q. It is your understanding, I take it, that Concrete Ship Constructors would be out, and by that expression you mean they would no longer have any right of any character or nature whatsoever, in the event the government exercised its right of priority?

A. That is my opinion. In other words, I think the Tavares Construction Company, under the terms of this agreement, was merely there as an operating manager and agent for the United States of America, building ships for the war effort.

Q. Why, then, did the lease contain the provision, "and Lessee shall fail or refuse to give such priority"?

A. Well, because, and then you may say quite apparently from the correspondence they did contend they had some right there, and the government had to be in a position because of the war to make—to take immediate action.

Q. I will admit, for the purpose of discussion, that the Concrete Ship Constructors did contend they did have a right. But let's get back to the meaning of these few words, "and Lessee shall fail or refuse to give such priority." What could have been the object of putting such a proviso in this lease, if they were to lose all their rights not- [960] withstanding the fact they did give such priority?

A. I don't know. I didn't write the lease, but, as I interpret it, under that clause the government certainly reserved for itself the right to take these facilities and

(Testimony of Charles B. Shattuck)

ask the Tavares Construction Company to step out of the picture and turn them over to others to run and operate.

Q. Now, you say they reserved the right to take them. Let's be more accurate. The agreement says, "or (b) the Government shall request priority for itself or others with respect to the use of the facilities to be provided hereunder,"—

A. That's right.

Q. So the priority right had only to do with the use?

A. That is all the lease had to do with, is the use, too.

Q. So that if the government exercised its right of prior use of the facilities and machinery, as it had a right to do, and the Concrete Ship Constructors accorded such priority when requested and the United States government continued in possession and retained such prior use until the termination of the lease, on December 31, 1949, what is there in this writing that you find that says that Concrete Ship Constructors could not have had the right to purchase on the expiration of that lease, according to its terms on, to-wit, December 31, 1949? In other words, what is there in there that would have kept Concrete Ship Constructors from stepping [961] up and saying to the United States government, "We are now ready to purchase this shipyard, complete with its facilities, and it was your duty under the contract to pay all insurance, taxes and upkeep on it for the entire five-year period since December 23, 1944, when you first commenced to use it." What is there in this agreement which to you, and under your interpretation, bars the Concrete Ship Constructors from saying on January 1, 1950, "Here is our option price. We have calculated the depreciation in accordance with our lease agreement, set forth on Exhibit Q, and after that credit and reduction of the option price, we,

(Testimony of Charles B. Shattuck)

on January 1, 1950, demand a deed to this property"? Just tell me and tell the jury in your own way, and I don't want to interrupt you, anything and everything that you think that would have precluded the Concrete Ship Constructors from electing to purchase on January 1, 1950, merely because the government had exercised the right of priority? Let's limit it in this question to the government having requested the right of priority.

A. Well, I would answer your question or statement in this way, that under paragraph (b) or clause (b), rather, of paragraph 14, the government reserved to itself the right to use for itself, or for others, this particular property, and they elected prior to the expiration date to do so, and, therefore, there was no option because they forestalled it [962] by their own action. The government did not grant the option. As I understand that lease, there were two things that had to happen before the option ever came into being, and it didn't come into being, and because it was speculative in that respect, in my opinion, it had no value, was worth nothing. And even assuming—even assuming that your position is correct, that my interpretation is wrong and yours is right, and they had that option, it is still my opinion it is worth nothing because they would have had to pay more for the site and for the used facilities and machinery than the entire property was worth or would have been worth in the open market.

Q. Have you calculated what the option price of the facilities and machinery would have been on January 1, 1950?

A. No, not in 1950, but—

Q. Will you turn to Exhibit Q and very quickly discuss with me,—do you have a copy of Exhibit Q, Mr. Shattuck?

A. Not with me.



(Testimony of Charles B. Shattuck)

Q. Turning to the last page of Exhibit Q, I direct your attention to Schedule 1. The original cost there shown is \$1,999,000 odd. That was a class of improvements relative to which the depreciation was five per cent; is that correct? A. The arbitrary rate, yes.

Q. As set forth in the lease?

A. That's right. [963]

Q. So that if the lease had run five years from December 23, 1944, until the exercise of an option on January 1, 1950, there would have been five years additional depreciation at five per cent per year, or a total of 25 per cent, and, therefore, you would arrive at the additional depreciation as to Schedule 1 by taking 25 per cent or one-fourth of \$1,999,796.75; is that correct?

A. That is right.

Q. And you would go through the same process with Schedule 2, as to the total cost of \$603,000 odd, except that you would take 10 per cent depreciation per year, for each of the five years, or an additional 50 per cent depreciation?

A. Not additional 50 per cent, but a total of 50 per cent.

Q. Five years from December 22, 1944 to December 23, 1949 would be five years additional?

A. Oh, that is right.

Q. And at 10 per cent per year that would be an additional 50 per cent? A. That's right.

Q. So you would have to take one-half of the \$603,023.04 as additional depreciation that would occur prior to December 31, 1950; is that correct?

A. That is right. [964]

(Testimony of Charles B. Shattuck)

Q. With reference to the other items of portable durable tools and automatic equipment, they would have been completely written off within the five years at 25 per cent depreciation, so that the remaining price under the option, which as of December 23, 1944, is shown there in the last column to be \$30,956.75 would be completely depreciated, would it not?

A. It would have been wiped out, that is right.

Q. So that when you add the total additional depreciation—

Mr. Crouch: Wait, please, Mr. Martin.

Mr. John M. Martin: All right.

Q. By Mr. John M. Martin: So that, when you add the total additional depreciation that would occur, according to the original schedule for depreciation in the lease, there would have occurred during the period from December 23, 1944 until December 31, 1949 a total depreciation of approximately \$832,000, in addition to that calculated on Exhibit Q; is that correct?

A. I haven't made the calculation. If you have made it, why, I will take your figure.

Q. Am I to understand that before expressing your opinion that this lease was worth nothing, you made no such calculation?

A. No, for the reason that it wouldn't make a great [965] deal of difference. In other words, the machinery and facilities would be five years older, and the depreciation you are taking is an arbitrary depreciation, and probably would not be sufficient. Probably it would be more than that actually, if they made any use of them at all. And, furthermore, many of these things at a future date, deferred back to today and discounted, would bring

(Testimony of Charles B. Shattuck)

us out at about the same price. In other words, an informed purchaser just simply would say, "I still would pay nothing."

Q. In other words, you jump to your conclusion without making the calculation or approximating the figure?

A. No, I didn't jump to my conclusion. I made a very careful study, but I didn't go into the realm of what might happen five years from now. It has been my experience as a real estate broker and appraiser that when people are talking about the market value of property as of a given date, they are a lot more interested in what happens right at that time and what happened immediately before that time than they are in what is going to happen five or six years from that time.

Q. You have proceeded on the theory that it was not proper, then, I take it, for you to take into consideration or express a value as to any property right that had a speculative value?

A. I don't think you can where it is a pure speculation. [1966] Property may have speculative value or a chance for a speculative increase in value, and that would affect its value now, but to take a legal document and to speculate as to what may or may not happen under that legal document and expect somebody to pay you something for it in the market, you just don't do it.

Q. You said that under your viewpoint the option had never come into being?

A. That's right.

Q. You don't understand, then, that this contract, Exhibit W, contains by its terms an absolute option, an absolute grant to the lessee of an option?

A. I don't understand that, and even assuming you are right, as I said before, assuming you are right and that

(Testimony of Charles B. Shattuck)

I was wrong, it is still my opinion that the lease coupled with an option had no value.

Q. So that to arrive at the option price as to the facilities and machinery as of January 1, 1950, it would have been necessary to deduct from the option price stated on Exhibit Q of \$2,141,236.49 an amount which I have approximated as being in excess of \$800,000.

A. All right. Then you still have the buyer, and when he went to look at that deal, he would say, "Well, let's see. This gear is five years old now, and it was used three years, approximately three years during the war full [1967] tilt, and it is now five years older. I don't think I would give very much for it."

I think the buyer would say, "Now, these buildings that were built out here, they are board and bat building." The Administration Building has probably two or three times as much area in it as anyone would need for a private undertaking, and they would say, "Well, I don't think, considering its age and type of construction, I would give you very much for it."

Then they would go over and look at the four wet docks, without any bottoms in them, and I think they would say, "Well, in a city the size of San Diego, we might just as well write those off right off the bat." There goes about \$1,000,000. He would say, "We can write that off. We wouldn't give a dime for it. It has no particular use."

So I don't think if an informed person looked that whole layout over and considering he would have to pay what he would have to pay the government to get it, I don't think he would, and I think he would say, "Uncle, you keep it."



(Testimony of Charles B. Shattuck)

Q. I understand what you are saying, but you haven't told me, and what I am trying to get before the court and jury now is the fact as to whether you gave consideration to certain things that are stated in this lease and option. Did you give any consideration to the question as to whose obligation it would be to maintain this shipyard in the [1968] event the government exercised the right of priority for the five years up to December 31, 1949?

A. I have already testified that if they elected to exercise that right of priority under clause (b) of paragraph 14, Tavares would be out.

Q. Let us assume, for the purpose of discussion, that you are wrong in that. Has it been your experience that the United States takes pretty good care of its shipyards, facilities, machinery and equipment?

A. I think I would answer that, "Yes."

Q. Do you understand whether or not the United States Government pays taxes on facilities and machinery that are permanently affixed to real estate subsequent to the date it has condemned and acquired the fee title?

A. The Defense Plant Corporation in using equipment of this was subject to taxes, insurance, and so forth.

Q. Just a moment. I don't think you understand the question. Read it, please.

(The question was read.)

A. Oh, not subsequent to the date of the condemnation, no.

Q. So that subsequent to the date of declaration in this case, whereupon the fee title passed to the United States government, is it your opinion that the government would promptly go off any tax rolls? [1969]

(Testimony of Charles B. Shattuck)

Mr. Landrum: Just a moment, your Honor. That is predicated on something which happened subsequent to December 23, 1944, and we took the property on that day, your Honor.

The Court: I think so. The right to terminate is as of that date.

Mr. John M. Martin: I only seek to show, if your Honor please, the question of future taxes. The lease clearly states we shall pay taxes, insurance, maintenance and upkeep, and I want to know whether, in arriving at his opinion he took into consideration as to whether the lessee would have to furnish the maintenance, the machinery upkeep, the watchmen and taxes, or whether he understands under the lease that those obligations then would become the burden of the United States government, in the event it exercised its rights of prior use.

The Court: You mean during the operative period of the lease, or during a subsequent period?

Mr. John M. Martin: I am assuming they may exercise the right of priority on December 23, 1944, and had continued in possession of the yard throughout the remaining portion of the lease, and the lease clearly says they are to pay, as lessee, the maintenance, insurance and taxes. I want to know whether the witness understands as to whose obligation it is, in that event.

The Court: I think your question was not clear, Mr. [970] Martin.

Mr. John M. Martin: I appreciate that, if the court please.

The Witness: I feel, counsel, that I already answered that when I said that if the government exercised its right

(Testimony of Charles B. Shattuck)

to priority in the use of those facilities that Tavares would have been out. Naturally, if he was out, he would not have the obligation.

Q. You do not understand that notwithstanding the exercise of the right of priority, that there was a contract obligation here on the part of the government to continue this property in existence as a shipyard, so that it could tender to the lessee, Concrete Ship Constructors, on the expiration of the lease, in accordance with its terms, to-wit, on December 31, 1949, the shipyard and facilities in the condition in which they existed when the government exercised its right of priority, subject only to fair wear and tear of the property?

A. No, I didn't interpret that document as being that kind of an obligation on the United States of America at all.

Q. All right. Then if there is any such obligation, you gave no consideration to it in arriving at your opinion as to value? A. No, not at all, because—

Q. All right. [971]

Mr. Landrum: Let him finish his answer, please.

Q. By Mr. John M. Martin: All right.

A. Actually, not at all, because it is one of those conjectural things that is subject to interpretation. In the market, why, that would just be another reason why a possible purchaser would just shake his head and walk away from it.

Q. Did you take into consideration, in arriving at the value of this leasehold estate, the question as to whether the acquisition cost of the site, the lands here, in the event the option was exercised on January 1, 1950, would in-

(Testimony of Charles B. Shattuck)

clude any interest on the acquisition cost during the ensuing period of years up to January 1, 1950?

A. It was provided that the option price, assuming the option came into being, was to be fixed at the actual cost, acquisition cost of the site, plus the acquisition cost of machinery and facilities, and so forth, less the depreciation as set up in paragraph (b) of paragraph 15 of the lease.

Q. That is correct. Now, what I am specifically inquiring about is whether you took into consideration any obligation on the part of the lessee, in the event he exercised his option to purchase, to pay any interest to the government on the acquisition cost of the site, the 100 acres of land upon which the shipyard was located?

A. I would have to check that lease document to make [972] sure of that, of whether they were to pay interest on the land cost.

Q. To refresh your recollection, I direct your attention to paragraph 31 of the Fifth Amendment, which was executed one day subsequent to the commencement of this condemnation suit, on the 11th day of November, 1942.

A. Pardon me?

Q. Paragraph 31, and I think it is the fifth page from the end of Exhibit W, which states:

"Lessee agrees that when Defense Corporation shall have acquired title to that part of the Site now being condemned by the Government, the Agreement of Lease, dated December 27, 1941, as amended, shall be further amended so as to provide for an increase in the maximum amount of expenditures to be made by Defense Corporation in the amount of the cost thereof to Defense Corporation (which amount



(Testimony of Charles B. Shattuck)

shall not exceed the cost thereof to the Government), and an increase in the amount of rental to be paid by Lessee under said Agreement of Lease, as amended, in an amount sufficient to cover the cost of such part of the Site. Lessee further agrees that in the event the property leased to Lessee under said Agreement of Lease, as amended, should be transferred to another branch of the [973] Government pursuant to paragraph TWENTY-SIX thereof prior to the acquisition by Defense Corporation of title to that part of the Site now being condemned by the Government, Lessee will, if it should thereafter elect to exercise the option to purchase conferred by paragraph FIFTEEN of said Agreement of Lease, as amended, pay to the Government the cost to it of such part of the Site on the same basis as if such cost had been part of the cost to Defense Corporation of the property leased to Lessee under said Agreement of Lease, as amended."

Now, can you state whether or not there would have been added any interest to the acquisition cost of the land, in determining the option price?

A. In my opinion, there would have been four per cent interest added to it.

Q. Upon what do you base that opinion?

A. On Section (a) of paragraph 15, where it provided two bases for estimating; in other words, you would have to go back and calculate which of those two bases would then apply, not knowing what the price of the land was going to be, because you have to determine whichever one is the greater.

(Testimony of Charles B. Shattuck)

Q. But do you understand the option price would be determined under any conditions by taking a combination of [974] (a) and (b), or must it be determined under either (a) or (b), whichever is the higher?

A. It must be determined under either (a) or (b), whichever is the higher.

Q. Where do you find any interest provision in option price (b)?

A. There is none in option price (b), but the point I am trying to make, counsel, is this, that the document itself, with reference to the machinery and the facilities in that paragraph, you just read reference to it being on the same basis as upon which the property was leased on the lessee, provided that the government was first to get back all of its cost, plus four per cent, and that as an offset against that cost, plus four per cent, the lessee was permitted to credit the rent he paid, plus four per cent from the date he paid his rent, and that when those two figures equaled each other, one wiping out the other, then the option came under paragraph (b) and under paragraph (b) the only thing they would have would be the actual cost of the site with the interest, plus the actual cost of the machinery and facilities, less the stipulated rates of depreciation.

Q. Well, am I now to understand that all the testimony you have given as to value of the option price had to do with formula (b) for determining the option price?

A. That is correct, because, in my opinion, that is the [975] one that will operate, because on about November the 5th, or October 5, 1944, the Tavares Construction Company apparently had settled on the question of the rent and interest, or approximately so; or it seems there might

(Testimony of Charles B. Shattuck)

have been some small balance, which I assume has since been adjusted.

Q. In other words, the total cost on the question of this machinery and facilities had, as of October 5, 1944, been fully repaid to the government, including interest on those amounts?

A. Yes, in the form of rent, which was paid as ships were completed for the government.

Q. That is correct. Now, so that you may clearly understand what I am trying to ascertain: is there, as you understand the option price under formula (b) any provision whatsoever for obligating Concrete Ship Constructors to pay any interest on the acquisition cost of the site of these lands, in the event the option was not exercised until December 31, 1949?

A. Based upon your assumptions, I would say that apparently there is no obligation to pay interest.

Q. At least no interest other than whatever might be allowed by this court to the landowners as a part of their compensation?

A. That, naturally, would be a part of the acquisition cost. [976]

Q. We are not apart on that? A. No.

Q. The acquisition cost would include interest as determined by any ultimate award, as made in this action?

A. That is correct.

Q. But what I am asking you is this: when that is determined in this case there will be no interest added for the succeeding period down to December 31, 1950?

A. I think not.

(Testimony of Charles B. Shattuck)

Q. Had you that thought in mind when you reached your opinion as to values, herein expressed?

A. No, I don't think I had that exact thought in mind, because, as I said before, I didn't make a calculation as to what the option price might be in 1950. I made a calculation as to what I thought it possibly would have been on the date of taking, which was December 23, 1944.

Q. All right.

A. And, as I said before, even though I had made the calculation which you have asked about, I gave here just a few moments ago the reason why I thought it still would not alter my opinion that this lease coupled with an option had a market value of nothing.

Q. If that is true, why didn't the United States government, in your opinion, simply serve a notice, a ten-day notice on December 23, 1944, of its intention to terminate [977] this lease on the expiration of 90 days thereafter, if, as you understand this lease, all of the rights of Concrete Ship Constructors would have expired and the option would have expired, and then the United States government would be at no expense and the condemnation suit would have been unnecessary.

Mr. Landrum: Just a moment. If the court please, I certainly am going to object to that, that the condemnation suit would be unnecessary. The condemnation suit would still be necessary.

The Court: Yes, it constituted a cloud on the title that would have to be removed. Regardless of its value, it would be a cloud on the title, just like a cloud on any other title. It may have a value, or it may not, and the jury is here to fix it, but so far as the legal aspect is concerned, there would be a cloud that, in order to get a fee



(Testimony of Charles B. Shattuck)

simple title unencumbered or uninfluenced by outstanding obligations, it would be necessary to remove.

Q. By Mr. John M. Martin: At least, as you understand this agreement, Mr. Shattuck, the service by the government under date of December 23, 1944 of a 10-day notice of the government's intention to terminate this lease, would have upon the expiration of 90 days thereafter have left the lessee with no rights under the contract?

A. Providing it elected to use it for itself, or for [978] others, needed it for itself or for others, I think that is right, although I think they would probably have had to clear it up in court because everybody is entitled to his day in court.

Q. I have passed from the question of priority. I am going to the right of either party to terminate the lease by serving a 10-day notice of its intention so to do, and let's assume that the government had served a 10-day notice on December 23, 1944 of its intention to terminate this lease as of January 2, 1945, and that there had expired the full option period of 90 days subsequent to January 2, 1945. Then, in your opinion, would the lessee, Concrete Ship Constructors, have had any rights under this lease?

A. Yes, they had a right for a period of 90 days, providing it was lawful for the Defense Plant Corporation to do so, and apparently there was some question whether that was lawful, but providing it was lawful, they had the right to have submitted to them by the Defense Plant Corporation the price which the Defense Plant Corporation had received in the form of bids on any items of

(Testimony of Charles B. Shattuck)

equipment, and they had the first refusal to purchase at that price.

Q. In other words, the opportunity to look over the other fellow's shoulder and see what he has bid, and for a period of 30 days thereafter to determine whether they, as lessees, wanted to purchase that part of the property or lease, [979] that part of the premises of the shipyard, at the price which the other bidder had made.

A. Well, I would answer yes, but I doubt that question of the lease, that it is included there. In other words, it referred to the machinery, the sale of the machinery and facilities, and nothing said about lease.

Q. You don't understand from this agreement they had a right to negotiate for the lease of a part or all of these facilities?

A. Oh, they probably had the right to negotiate. Almost anybody has the right to negotiate. You don't have to have an agreement to have that conferred on you. But that agreement for that period of 90 days, after the expiration of 90 days merely said that if it was lawful for the Defense Plant Corporation, that it would grant to the Tavares Construction Company the first refusal, you might say, of the purchase price on any bid price it received for any portion of the machinery or facilities, so they could either meet it or not, as they might elect to do, and in the way you may put it, they were looking over the other fellow's shoulder.

The Court: I think we will take our recess now, ladies and gentlemen. Remember the admonition.

(A short recess was taken.) [980]

(Testimony of Charles B. Shattuck)

The Court: All present. Proceed.

Q. By Mr. John M. Martin: Mr. Shattuck, in direct examination, you testified, in substance, that, in your opinion, an estimated sale price which a prospective purchaser might be willing to pay for this shipyard would have been \$1,985,000 or approximately that amount. Will you tell us what portion of that \$1,985,000 you included as the prospective sale price of the site itself, the land as distinguished from the facilities and machinery?

A. \$720,000.

Q. That \$720,000 was a prospective sale price of the land as of what date of sale?

A. As of December 23, 1944, and that was for the land as fully improved, after the government had spent \$468,752 on it in installing dredges, roads, grading, bulkheads, spur tracks, sewers, telephone lines, water and air lines and power and light.

Q. And was, of course, after the government had spent any other sums that might have been spent in connection with the development of this project, we will say prior to the date the option was exercised?

A. These sums which I have just enumerated here are all included in Exhibit Q.

Q. Oh, I see. In other words, there are certain items, that are shown in Exhibit Q, which actually were improvements, which the government made to raw land, in order to create a [981] completed, developed, useable piece of harbor land?

They included all of the improvements to the site, and the land itself?

A. That is right.

(Testimony of Charles B. Shattuck)

Q. Down to December 23, 1944?

A. That is right. In other words, you asked me what I would assign to the site on December 23, 1944. On that date I am looking at that site as an improved piece of ground, that was improved by money spent by the government, which changed the value of that site, because, if one were to move the shipyard entirely off of there, there are certain moneys for improvements which the government expended on the land which wouldn't be moved. They would remain there as a part of that site, regardless of the use to be made of the land.

Q. That \$720,000 was the amount which you estimated a prospective purchaser might be willing to pay, if such site is improved, as of a sale as of December 23, 1944?

A. Well, it might be answered yes in this way. Assuming that all of the machinery and other shipyard facilities and so forth and the batching plant and all of that were moved off, and assuming that the wet docks had been filled and the land was there as a piece of harbor land on that date, improved as the government had improved it with the grading and the sewers and the lights and water and gas, these im- [982] provements I have mentioned, and dredging of Area A, why that would have, in my opinion, been the value of that improved piece of harbor ground.

Q. That, of necessity, assumes, as I understand you, Mr. Shattuck, a sale of the site to a prospective purchaser who would have no use for any of the four graving docks or wet docks?

A. In my opinion, those were good only for war time operation. They are too small to take in an ordinary



(Testimony of Charles B. Shattuck)

large sized ship. They can just handle small vessels in there and I think it is just money lost for anything except the particular operation for which they were created.

Q. You have not included in the prospective sale price anything for either of those four basins?

A. In my total of \$1,985,000, in considering the equipment and so forth, I left in that the best of the four. I left one of them that it was possible that someone might find a use for, one of them, during peace time economy here in San Diego.

Q. But at least three of them were completely excluded from consideration in arriving at a prospective sale price?

A. My judgment would be that any informed purchaser would completely discount at least three of those docks.

Q. In your figures did you leave intact the graving [1983] dock built with timbers, where the evidence shows it would have a life of 10 to 15 years, or did you leave intact the graving dock built with steel sheeting, which had a life of 30 to 40 years?

A. I left in my calculation the one which had the longer life, which was the better dock.

Q. The wet dock would be No. 3 or No. 4?

A. That is right.

Q. In arriving at that prospective sale price of \$720,000 for the land, did you include any amount in dollars due to any element of increase in market value in the land subsequent to November 10, 1942?

A. In forming my judgment, yes, in this manner, that I am fully aware of the existing leases on other developed and improved harbor land in the City of San Diego, and

(Testimony of Charles B. Shattuck)

I have an opinion as to what the rental value would be of this improved and developed site. And considering this particular harbor land in the light of what I know about other harbor lands in and about San Diego, as well as in the Long Beach and Los Angeles Harbors, it is my opinion that that figure which I set of \$720,000 was a reasonable and most likely market value for the improved site on December 23, 1944.

Q. Have you included any element of increase in value of the land for the period from November 10, 1942, to December 23, 1944?

A. My answer to that was yes. [984]

Q. How much in dollars?

A. Well, I don't know that I can measure it in dollars. In other words, this land, that was undeveloped harbor land in 1942, was worth \$251,000 and in the meantime large sums of money had been expended, and, in my opinion, the general increase in real estate prices which occurred was sufficient together with the expenditures that had been made to warrant my saying that, in 1944, in December, this land had a value, as improved, of \$720,000. Now, generally, I would say that the probable increase in the market price of real estate—it is pretty difficult when you use general terms of this kind because, when you get down on different pieces, sometimes it is different, but, generally, I would say that the increase in price would not have exceeded say 40 per cent. But here we have a problem where you had a piece of raw land that, during that interim between 1942 and 1944, had very large sums of money spent on it, which completely changed its character. So that it is hard to say what the increase was because you would have one class of one

(Testimony of Charles B. Shattuck)

thing, a raw, undeveloped thing to commence with, and they would have that I am talking about in 1944, this more or less completed improved piece of harbor land.

Q. Were you present when Mr. Cotton testified?

A. I was here a portion of the time when he was testifying; yes. [985]

Q. Directing your attention to page 829 of the transcript, where he was asked the question, "There was a very material change in values between 1942 and 1944, was there not?"

A. "There was; yes," is that in accordance with your opinion?

Mr. Landrum: That is objected to, if the court please, first, upon the ground and for the reason it is setting one witness up against another.

The Court: I think so. It is a comparison of testimony that is not proper except in summation you may argue those matters to the jury. Don't ask one witness to compare his testimony with another. Otherwise, there is no use of having the jury here. That is their function.

Q. By Mr. John M. Martin: I do understand that you made no calculation as to any increase in value for the land itself for the period subsequent to December 23, 1944 and up until December 31, 1949?

A. No; I made no estimate as to what the value of this land might be in 1949.

Q. You have formed no opinion as to what the fair market value of this land might be as of January 1, 1950?

A. No; I have not formed any opinion in that regard. In other words, to me that would be a highly speculative thing to try to do. [986]

(Testimony of Charles B. Shattuck)

Q. In values generally, where they are determined by experts equally well qualified and equally well informed, there may reasonably exist a substantial difference in opinion, is that not true?

A. Well, I would like to—or I believe I will answer that question no for the reason that you qualified it by saying they were equally well informed and equally well qualified. I think, if two appraisers are equally well informed and equally well qualified from the standpoint of experience and background, and they each made the same careful study, there shouldn't be any too great difference in their conclusions.

Q. You include in that, do you not, Mr. Shattuck, an equal opportunity to observe and study?

A. Well, naturally, they would have an equal opportunity. In other words, if a man's background and experience is such that he has not had the opportunity to observe what happens under certain conditions, why then his opinion might not be as good as one who had that opportunity.

Q. Did you have an opportunity, Mr. Shattuck, to observe the condition in which these facilities and utilities existed as of December 23, 1944?

A. No; I didn't see them on that date but I did have the asset property record of the Defense Plant Corporation and I did talk with Mr. Boyer and with others on the ground there [987] who were somewhat familiar with this equipment.



(Testimony of Charles B. Shattuck)

Q. But you have no personal knowledge as to the state or condition of repair these facilities were in or as to their usual condition as of December 23, 1944?

A. I have a statement from the Defense Plant Corporation, which I assume is the same one which the Tavares Construction Company has, in which they are classified as to what their condition was at that time.

Q. You spoke a while ago about the shipyards being worn out. Did you know, when you reached your opinion as to the fair market value of this lease and option, that the shipyard was not actually completed and these facilities were not finished as to construction until along in March of 1943?

A. Yes; I think that I was aware of the fact that this was comparatively and recently completed.

Q. When you stated that they had been used three years prior to December 23, 1944, it is only a small portion of them could have been used, isn't that correct?

A. Well, a good deal of that equipment was second-hand when they went in there. They were just using everything they could lay their hands on and it wasn't brand new when it went in there.

Q. But you personally have no knowledge or observation as to the condition of these facilities or machinery as of December 23, 1944? [988]

A. Other than from the records and from the fact that the investigation revealed that that yard had operated at full tilt. And, when you operate machinery of this kind at full tilt, that means extraordinary heavy wear and tear and they give up their value very rapidly.

Q. In my question I asked you, from your personal observation of the facilities and machinery, did you ever

(Testimony of Charles B. Shattuck)

at any time see either the facilities or the machinery here in operation as a shipyard?

A. Yes; I did. I was down there in 1943 on this property.

Q. You would say approximately a year prior to December 23, 1944?

A. I don't know that I can say exactly. I do know I went down there one day with, I believe it was Mr. Kemmerer, if I remember right, but just when it was—to the best of my recollection, it would be some time during the year 1943.

Q. Did you on that occasion go there for the purpose of apprising yourself as to the condition, the useable condition or state of repair, of the facilities and machinery?

A. No; I did not.

Q. You went there for some other purpose, I take it?

A. That is right. I went out there because there was some question in Mr. Kemmerer's mind. He was doing some work in connection with evaluation of land in that area. [989]

Q. You have spoken about there being approximately \$25,000 difference in your figure in computing the option price as to the facilities and machinery from the figure stated in Exhibit Q. Was your figure of \$25,000 more or less?

A. Well, my figure—you say was it more or less. It would depend on how you figured it. In other words, in making your estimate, or the Tavares estimate, they deducted depreciation on service charges and there were some items of that character that, in my opinion, were not subject to depreciation. In other words, I don't know just how you would depreciate them.

(Testimony of Charles B. Shattuck)

Q. In other words, as to the element of service charges, if it includes salaries to officers of the Concrete Ship Constructors, there would be no depreciation?

A. I don't know how you would depreciate that.

Q. Would that not become unimportant if the entire amount incurred as costs by the government had, under date of October 5, 1944, been fully repaid to the government, with interest?

A. Well, I suppose, as far as figuring this matter of valuation, it might become unimportant. But the point that I see from the standpoint of considering the question of the value of this lease and option is that my estimate, regardless of whether it was high or low, was so close to the estimate [990] that the Tavares Construction Company made as to what that depreciated cost was on that date there was no use of hardly discussing it. It was too close. The margin of error was too small.

Q. Was it an error or was that a matter of classification?

A. That is right; it was a matter of classification. They charged depreciation against service costs, where I didn't. So that made some difference. And there were some classifications of one or two other items. So that, where you are that close together, you had just as well agree, so that there is no room for misunderstanding.

Q. As a matter of fact, if there were any sum of money paid officers of Concrete Ship Constructors, would

(Testimony of Charles B. Shattuck)

that not increase the option price at which Concrete Ship Constructors could purchase this property? In other words, wouldn't they have to pay it twice, first, in rentals to the government and, second, wouldn't it increase the option price and wouldn't they have to pay it a second time if they elected to exercise their option?

A. Well, if they paid the officers of the Tavares Construction Company any salaries, that would be part of the cost of the facilities and the machinery and the site, that is, of the entire lay-out.

Q. That is correct. [991]

A. And, therefore, it would have to be figured perhaps in the figuring of the option price in the end, but, whether they were paying for it twice or not, I doubt it because it was government money that was being paid for it in the first place, and, if they took salaries under the contract, the contract specifically provided that they shouldn't be paid any salaries.

Q. In other words, any error to exercise their option in that respect would be a disadvantage to Concrete Ship Constructors, would it not, first, by increasing the amount of rentals they would have to repay the Defense Corporation and, second, by increasing the option price?

A. I suppose, on your statement, that that might be true. However, the fact that they had had the salaries in the meantime might be of benefit to them.

Q. In the interest of shortening this cross examination, I will ask you, Mr. Shattuck, have you pointed out



(Testimony of Charles B. Shattuck)

to me the most disadvantageous provision that you have been able to find in this lease and option contract, or have I picked upon some of the minor points?

A. I think we have gone over it pretty thoroughly. I think the most disadvantageous point of the whole thing is that it is so confusing there, the whole thing, that no business man would be able to calculate what he should pay for it and, therefore, he would not pay anything for it.

Q. And you, as [992] a broker, wouldn't have been able to explain the contract rights to a prospective purchaser?

A. We have tried to do as well as I have tried to do here today. Whether I have succeeded or not, I don't know. To me the lease, coupled with an option—there are so many ifs, ands and buts about it, that it is just a conjecture, and I don't believe in the open market, where you have a lease coupled with an option such as this, it would be anything or would command anything other than nothing.

Mr. John M. Martin: That is all.

Mr. Landrum: Is there any further cross examination of Mr. Shattuck by any of you gentlemen?

Mr. Monroe: I can't think of anything else.

Mr. Landrum: All right, Mr. Shattuck; that is all.  
Mr. Mason.

TOM MASON,

called as a witness by and on behalf of the plaintiff,  
having been first duly sworn, was examined and testified  
as follows:

The Clerk: Will you state your name?

The Witness: Tom Mason.

Direct-Examination,

By Mr. Landrum:

Q. Where do you live, Mr. Mason?

A. 916 North Edgemont, Los Angeles.

Q. How long have you lived in Los Angeles? [993]

A. Since 1911.

Q. How old a man are you?

A. I will be 55 in March.

Q. What is your business?

A. Realtor and appraiser.

Q. How long have you been engaged in the real estate  
and appraisal business? A. Since June, 1923.

Q. Will you sketch briefly for the court and jury  
your experience in the real estate and appraisal business,  
with particular relationship, Mr. Mason, to your work  
in connection with harbor lands and properties?

A. Prior to entering in the real estate business in  
June, 1923, I was in charge of all rail operations in the  
Wilmington section of Los Angeles Harbor, for a period  
of five years, and my duties in connection with that work  
were supplying rail cars for the various steamship com-  
panies unloading freight at the docks. I had to have a  
knowledge of the assembling and discharging of cargo  
and the docking of ships and things of that kind that  
appertain to a port. Since I entered the real estate busi-  
ness, I have bought and sold property for myself and

(Testimony of Tom Mason)

others in the harbor area. I have appraised property in the Los Angeles Harbor and the Long Beach Harbor area and, as a matter of fact, the territory in which I have mostly appraised property is from San [994] Francisco on the north to San Bernardino on the east, San Diego on the south and Avalon on the west, among the harbor properties that I have appraised, I have appraised the entire holdings of the Los Angeles Harbor, some 2500 acres of harbor land, on the ship water channels, and I have appraised all of the Long Beach Harbor on three different occasions, that is, the privately owned lands in Long Beach and some of the municipally owned lands in Long Beach Harbor. I have appraised the right-of-way of the Union Pacific into the Los Angeles Harbor and have purchased and acquired the right-of-way subsequent to the appraisal thereof. I appraised all of the Santa Fe Railway holdings in the Wilmington section of Los Angeles Harbor. I have appraised the right-of-way acquired by the Harbor Belt Line in their extension through the Consolidated Lumber Company's fee, that owned harbor frontage and the leasehold of the Consolidated Lumber Company on the adjacent property, and the leasehold of the Patton-Blinn Lumber Company and the Pacific Redwood Lumber Company. I have appraised the leaseholds of the Hammond Lumber Company on three different occasions for tax actions, and that is their leasehold of the harbor property at Los Angeles Harbor, and the San Pedro Lumber Company, the Consolidated Lumber Company and the Patton-Blinn Lumber Company. I have appraised the site acquired by the Harbor Department of the City of Los Angeles in adding additional area for the site of the Con- [995] solidated

(Testimony of Tom Mason)

Shipbuilding Company into the Wilmington section of the Los Angeles Harbor. I appraised the right-of-way acquired by the Maritime Commission in constructing a railroad into the California Shipyard on Terminal Island for the serving [995a] of the employees, taking them to and from the job. I appraised the right-of-way acquired for the construction of a passageway, an overhead over the Patton-Blinn Lumber Company's property to bring the workers for the Calship to the ferry landing to escort them across the bay. I appraised the property of the Union Pacific located on the south side of Cerritos Channel in Los Angeles Harbor, several parcels in there, one particularly of 40 acres adjacent to the draw bridge that crosses the channel at the easterly end of Los Angeles Harbor and the westerly end of the Long Beach Harbor. I have appraised a number of properties belonging to the Union Pacific in Long Beach Harbor. I appraised all of the properties of the Pacific Dock and Terminal Company, who at one time acquired all of the privately owned property in the Long Beach Harbor. I appraised a number of pieces of privately owned water frontage in Long Beach Harbor, that was acquired by the City of Long Beach for enlarging their municipal harbor, both lands and improvements and developments in the harbor area. I appraised the property referred to by one of the other witnesses as the Spanish Bight on Coronado Island. I appraised a piece of property adjacent to the subject property on the south. Briefly, that covers the harbor appraisals.

Q. Mr. Mason, I am just a little interested in your last statement you made that you appraised a piece of



(Testimony of Tom Mason)

property adjoining the subject property on the south.  
[996]

A. That is correct, sir.

Q. When did you do that?

A. I was authorized to make the appraisal a little over a year ago and made an inspection at that time, and had an illness and didn't get around to finish it until recently. That is the property that the Navy has acquired southerly of the property under condemnation in this action.

Q. The studies that you undertook here for us, Mr. Mason, have to do with a date, December 23, 1944. Do you understand that?      A. I do.

Q. I want you to tell this court and jury how close to that actual date, if at all, you were personally upon the property with which we are here concerned?

A. The closest date to December 23, 1944, that I was on the subject property was January 16, 1945, in company with Lieutenant Platz of the Navy, in the land section, who made an inspection of this property at the time for the purpose of making an appraisal of it. Prior to that time, in the early 20's, I was on the property once or twice when a number of the retired Navy ships were at anchor in the Bay.

Q. I am also interested to know whether it so happens that, when you were on there in January, 1945, you took some pictures of some physical objects upon this property.

A. I did not; no. In fact, I never did. [997]

Q. Now, Mr. Mason, there is a little question in this case about private ownership of tidelands. You have

(Testimony of Tom Mason)

been here and heard the evidence in the case rather fully, have you not?

A. I have been here most of the time; yes.

Q. Do you know what counsel is driving at and these other witnesses when they are talking about private ownership of tidelands?

A. I think I have an idea; yes.

Q. Do you know of any tidelands in the State of California, as described and defined by counsel, which are privately owned?

A. Yes.

Q. Tell us what they are.

A. Tidelands, as I understand it, described so far in this case, are lands that extend from the established mean high tide line seaward or to the water of that line. In this particular connection the tidelands rest between the mean high tide line as established and the pierhead line as established by the Army Engineers. In the Los Angeles area they adjudicated the high tide line due to the fact that there were meandering sloughs around there in the early days when they used the harbor, and they established the pierhead and bulkhead line, some of which were coincident with each other and others being separated by 60 feet or so. A number of properties that were referred to earlier, for instance, the [998] Banning property in the west end of the West Basin—that is one piece of property that comes within that description of tidelands that are in private ownership. And there were two pieces of property adjoining that, owned by Lucy Rice Banning, that were acquired by the City of Los Angeles in 1923, that were tidelands. And there was a tideland piece on

(Testimony of Tom Mason)

Mormon Island that was acquired by the Pacific Coast Borax, and they built a big plant on that and it is still in there. On the westerly end of Mormon Island the Banning Estate, and when I mention the Banning Estate, I refer to the Bannings who came to the Harbor in the early days and founded the town of Wilmington, owns a considerable area there. In the East Basin of Los Angeles Harbor the Union Pacific Railway owns at one point about two triangular pieces of about 10 or 15 acres each, on both sides of the Cerritos Channel. On the channel that runs from Long Beach to Los Angeles Harbor the Union Pacific owns land aggregating something in excess of 1,000 acres. As we approach the Long Beach Harbor, the Los Angeles Dock & Terminal Company owned practically all of Long Beach Harbor at one time. A portion of it has been acquired from time to time by the City of Long Beach for the development of their municipal harbor. They sold their holdings to the Los Angeles Dock & Terminal Company, who, in turn, disposed of practically all of their holdings, with the exception of one piece of 100 acres, at the north side of [999] Cerritos Channel and the northerly side of Channel 3 in the Long Beach Harbor, which they acquired in 1923 and still are in possession of. The Southern Pacific owns the land that fronts on Channel No. 3 and, Channel No. 2 in Long Beach Harbor, and that turning basin originally approximated 49 acres, of which they sold off some 17 or 18 acres to the Los Angeles Soap Company or, rather, to Proctor & Gamble, who have constructed a plant on there. And there are a number of smaller pieces in the Long Beach area that come within the definition of tidelands as described in this action.

(Testimony of Tom Mason)

Q. Now, Mr. Mason, will you tell us just briefly what you did to make an investigation to prepare yourself to come into this court room to testify in this case?

A. As I stated, prior to my inspection of the property on January 16, 1945, I had become generally familiar with it in my many trips to San Diego Harbor. I secured a map of the property and I determined or estimated its size and obtained information that would allow me to calculate the areas of both the upland and the areaway between the pierhead and the bulkhead line. I ascertained whether or not the subject property was zoned through talking to the City Clerk of National City and the engineer, Mr. Ireland. I secured photostatic copies of the invoices covering the properties, that were acquired, machinery and material and labor and so forth, that [1000] went into the construction of this shipyard. I secured a copy of the lease known as Plancor 401 and studied and analyzed it. I had copies of various communications between the Tavares Construction Company and the Concrete Ship Constructors and the Reconstruction Finance Corporation, the Defense Plant Corporation, the Maritime Commission and the Navy. I secured information as to what properties were leased in the San Diego Harbor area for and the rentals being paid for those leases. Briefly, I believe that covers my investigation.

Q. Now, for what purpose were you making this investigation? What were you going to do?

A. The investigation was made for the purpose of assisting me in forming an opinion as to the value of the lease, coupled with the option, as contained in Plancor 401, or the lease between the government and the Tavares Construction Company.



(Testimony of Tom Mason)

Q. And what do you understand to be the definition of the term "market value"?

A. My understanding of the definition of "market value" is a sum of money a piece of property would bring if exposed in the open market for sale, allowing a reasonable time to consummate a deal; that the deal was made between a willing buyer and a willing seller, and neither compelled to act, and both being well informed as to all of the benefits as well as anything that might detract from the property. [1001]

Q. To what factors, then, did you give consideration in arriving at your opinion?

A. I, first, considered the size and shape of the property which is the subject of this action. I considered the improvements constructed there by the Tavares Construction Company as holdings for the government. I considered whether the land had been developed from ordinary overrun tidelands to a harbor site 10 to 12 feet above mean lower low water. I considered its location as to the metropolitan area of San Diego, its location as to the deep water channels and the harbor. And I considered the fact that there was approximately  $64\frac{1}{2}$  acres of upland or dry land, that is, land behind the bulkhead line that had been filled; that there were some  $35\frac{3}{4}$  acres of land that were submerged or which were under water. I considered the fact that, prior to the occupation by the shipyard people, the subject property had been filled from dredgings from the main channel of San Diego Harbor. I considered the fact that the San Francisco Bridge Company had dredged a portion of what has been referred to as Parcel A and constructed a mole pier, of which their Parcel 7 ultimately became a part, or was a part

(Testimony of Tom Mason)

before they made the pier. And I considered the fact that leases for harbor frontage in the San Diego area, up to December, 1904, generally speaking, were leased at the rate of one cent per square foot for the first five years and graduated there- [1002] after during the term of the lease. I considered the fact that, after the Tavares Construction Company started to work on this project, they had dredged the remainder of Parcel A and deposited the spoil on the upland, creating the land as it was in December, 1944. I considered the fact that the subject tidelands were approximately all one piece of tideland near National City that was filled to a mean or elevation of 12 feet above mean lower low water. I considered the fact that there was at least more than a mile of frontage on the landward side of the San Diego Bay that was capable of being developed similar to and comparable to this property. I considered the fact that the Tavares Construction Company were occupying the subject property under an agreement known as Plancor 407, and that it was entered into, I believe, in 1941, December 21st, if I remember the date correctly, or some time around that date. I considered the fact that the subject tidelands were improved with a shipyard for the construction of boats for the U. S. Maritime Commission. I considered the fact that the Tavares Construction Company had agreed to assign to the Defense Plant Corporation or the Commission the lease that they then held on tideland properties, which were a part of this site. I considered the fact that the Defense Plant Corporation had agreed to pay all costs of the construction of this shipyard. [1003]

(Testimony of Tom Mason)

I considered the fact that when completed the Defense Plant Corporation had expended somewhere in the neighborhood of \$2,650,000, after all adjustments had been made, and that that sum, plus interest at four per cent had been paid to them by the Tavares Construction Company as rent.

I considered the fact that paragraph 15 of the option or the lease, Plancor 407, provided that Tavares Construction Company were granted an option under certain terms and conditions.

I considered the fact that this option was granted under the terms of the lease, terminating under paragraph 12 or clause (a) of paragraph 14.

I considered the fact that the lease had never been canceled by either one of these two items.

I considered the fact that the Tavares Construction Company had a lease that was more or less firm until 1947, and automatically extended to 1949.

I considered the fact that this lease was granted for the purpose of constructing boats for the government, and that if any private work was entered into, that rent would have to be paid for it other than the free use they had after the completion of the existing contracts.

I considered the fact that the area between the bulkhead lines and pierhead lines was separated by approximately 1,000 feet, and that no change in these lines or no construc-[1004] tion could take place in that area without the permission of the Army Engineers or the Board or Rivers and Harbors; that that area could be used for the construction of wharves, docks, etc., if they secured such permission; and also for the maneuvering of water

(Testimony of Tom Mason)

craft, and tying up of water craft to any dock that might be built.

I considered the fact that between the end of the mole pier and the pierhead line that there was approximately one-half to 15 feet of water in that area, and that area northerly of the mole, extending to the northerly line of parcel A, or parcel A itself, had water that went to a depth of between four and one-half feet to as deep as 21 feet.

I considered the fact that the Tavares Construction Company had the right of refusal of any of the facilities that might be offered for sale within a period of 90 days; after the expiration of the 90-day option period, that they had that right for 30 days, and if nothing was offered for sale within that time, that they did not have any right of refusal.

I considered the fact that we were at war at that time, and that because of the war this shipyard, and many others, were constructed, and that the war was of a nature that shipyards would be in demand until such time as the war might end, regardless of which side might have won it.

I considered the fact that every facility, to my [1005] personal knowledge, on the Pacific Coast at or about the date of the taking under this case in court today, that is, December 23, 1944, that every facility on the Pacific Coast was used in the repair of ships either damaged in action or Merchant Marine ships that were damaged going to and from places in the Pacific.



(Testimony of Tom Mason)

I repeat again that every facility as of that date, to my knowledge, that was available was being used for that purpose, and that, again, was only a temporary situation until the war was over, whether we won or whether we lost it.

Q. Now, did you have any information with relation to the extent of the use that was actually being made by the Tavares Construction Company of these facilities at that date?           A. Yes.

Mr. John M. Martin: You are referring now, Mr. Landrum, to December 23, 1944?

Mr. Landrum: Yes, sir.

The Witness: The information I had was one of the letters which was introduced into evidence, showing that the man-hours employed by Tavares Construction Company as of 1943 were 7,000,000 some odd man-hours, and as of 1944, as estimated, was 2,400,000 or 2,500,000, the estimation part being for the last two months of the year and they had the accurate figures for the first ten months of the year, [1006] but made an estimate for the remaining two months.

The Court: I think we will suspend now. Tomorrow morning at 9:30, ladies and gentlemen, and remember the admonition.

(Whereupon, at 4:45 o'clock p. m., Tuesday, February 25, 1947, an adjournment was taken until 9:30 o'clock a. m., Wednesday, February 26, 1947.) [1007]

San Diego, California, Wednesday, February 26, 1947,  
9:30 a. m.

The Court: All present. Proceed.

TOM MASON,

the witness on the stand at the time of adjournment, having been previously duly sworn, resumed the stand and testified further as follows:

Direct-Examination (Resumed)

By Mr. Landrum:

Q. Mr. Mason, I believe when court recessed yesterday afternoon you had discussed with us the question of what you considered in connection with that portion of Exhibit W in so far as it related to the so-called option. Now, will you discuss with us what you considered in connection with Exhibit W in so far as it contained a so-called lease?

A. Exhibit W is the lease between the Defense Plant Corporation and the Tavares Construction Company, Plancor 407, wherein the Tavares Construction Company had a lease on the subject property from the government. I considered the fact that it had this lease and that they were occupying the property in accordance therewith, the fact that they were paying rent for the lease in accordance with the contract, and the fact that this lease was non-assignable without the consent of the various governmental agencies in connection therewith, and the further fact that we were at war and the [1009] necessity for building ships, which was the basis for the establishment of this yard in the first place, and it was not reasonable to assume that such assignment would take place during that time.

(Testimony of Tom Mason)

Q. Did you consider the question of whether or not the Tavares Construction Company, under and by virtue of Exhibit W, might possess this property free of rent from the date of their last payment?

A. Yes; as I stated yesterday, the Tavares Construction Company had the right under this lease, as I interpreted it, to have it free of rent if and only if they were constructing boats for the government. Otherwise, they would have to pay some rent.

Q. Did you have any information with relation to the amount of rent that they might pay should they use these facilities in the construction for private individuals, having previously received the consent of the Defense Plant Corporation and the Maritime Commission?

A. I did; yes, sir.

Q. What did you find with relation to that?

A. I found that the Tavares Construction Company, if engaged in private work, would have to pay rent at the rate of 10 cents per man hour, direct man hour.

Q. Mr. Mason, from your experience in the buying and selling and appraisal of real estate and your own personal [1010] studies and inspection of this property, do you have an opinion with relation to the market value of the rights which the Tavares Construction Company and its associates have in these premises under and by virtue of the contract entered into between them and the government of the United States, on the 27th day of December, 1941? Do you have an opinion?

The Court: What date?

Mr. Landrum: I said under the contract dated December 27, 1941, your Honor.

The Court: Is that 1941?

(Testimony of Tom Mason)

Mr. Landrum: Yes, sir. What I mean is this; their rights arise by virtue of this contract and I stated referring to this contract.

The Court: All right.

Q. By Mr. Landrum: Do you have an opinion?

Mr. Sloane: To which I object unless the date be fixed.

Q. By Mr. Landrum: As of December 23, 1944.

A. I have; yes, sir. [1011]

Q. What is that opinion?

A. My opinion is that the lease coupled with the option has no market value and is worth nothing.

Mr. Landrum: You may cross-examine, gentlemen.

#### Cross-Examination

By Mr. Monroe:

Q. Mr. Mason, are you familiar with this plat here?

A. Somewhat, yes, sir.

Q. I wonder if you would step down here, please, and to make my questions clear, sir, if you would point out to the jury on this plat again where the mean high tide line is.

A. The mean high tide line is approximately up in this area here (indicating).

Q. That is, you are pointing—

A. I am pointing to what would be the westerly—wait. That is north, isn't it?

Q. Well, let us say up by the railroad tracks?

A. The landward side, up by the Santa Fe Railway.

Q. And where, if you will point out again, is the bulkhead line?



(Testimony of Tom Mason)

Mr. Landrum: Now, if the court please, I am going to object on the ground and for the reason that this witness has testified to nothing with reference to the claim of the City of National City, and it is not proper cross examination.

The Court: I was wondering what phase, Mr. Monroe, you [1012] would be interested in in his testimony, unless you are examining on behalf of Tavares.

Mr. Monroe: Oh, no. I am not interested in them.

The Court: What phase are you examining on?

Mr. Monroe: I am merely examining on the phase of the matter of privately-owned tidelands.

The Court: You may call him as your own witness.

Mr. Monroe: Oh, no. Thank you. No further questions.

The Court: Gentlemen for the Tavares interests.

Mr. John M. Martin: Pardon me, if the court please?

Q. By Mr. John M. Martin: Mr. Mason, did you hear my cross examination of Mr. Shattuck?

A. I think I heard most of it. I stepped out in the hall during a part of it.

Q. Well, did you hear all of government counsel's direct examination of Mr. Shattuck?

A. I think I did, yes, sir.

Q. In the interests of time, I will ask you if the same questions were put to you as you heard put by government counsel on direct examination to Mr. Shattuck whether your answers would be the same.

Mr. Landrum: That is objected to, if the court please. You cannot set one witness up against the other.

Mr. John M. Martin: I will limit that question.

(Testimony of Tom Mason)

Q. By Mr. John M. Martin: In answering that question, [1013] Mr. Mason, I desire you to limit your answer to merely those questions propounded by government counsel which had to do with Mr. Shattuck's understanding of the lease and option contract.

Mr. Landrum: I make the same objection, if the court please.

The Court: I do not believe that is a proper method to examine an opinion witness. I think the jury might get the wrong impression from such a limitation of the scope of cross examination. If counsel wants to cross-examine these witnesses he should do so, but the witness should not be placed in a category where you, as jurors, will not be able to analyze the testimony of each witness and give to each witness the credit which you individually think each witness is entitled to; and when we consider so-called expert evidence we are getting into the realm of opinion rather than factual deduction, and the opinion which the witness gives is only as strong as the reasons which he assigns for that opinion. You are judges of that fact. The reasons that a witness assigns for an opinion is the criterion for evaluating expert evidence, and that would not be a fair method of presenting it.

I am not now using the term "fair" in the sense that I think that Mr. Martin is not trying to be fair. I have not indicated anything of that type and do not desire to be [1014] understood as indicating anything of that type, but it is not the legal method because it brings into that situation the comparison of one witness against another, which is not the proper method. You are the judges of that, and the only way you can judge it is to hear what the witnesses say and to listen to the opinions which they

(Testimony of Tom Mason)

express, and to analyze the reasons which they give for those opinions, the latter being the principal feature in the case, where it depends upon expert evidence.

Proceed.

Q. By Mr. John M. Martin: Have you, Mr. Mason, a copy of Exhibit W, the lease and option contract, with you on the stand?

A. I have a copy of the original made for me, at my request, in the preparation for this trial.

Mr. John M. Martin: May I hand the witness a copy of Exhibit W?

The Court: Here is one, Mr. Martin.

Q. By Mr. John M. Martin: I hand you a copy of Exhibit W, Mr. Mason. Directing your attention to paragraph 12, Mr. Mason, particularly that portion thereof which states, and I am commencing at the middle of the third line at the top of the page, or, in the interests of clarity I think I had better start right at the very beginning of paragraph 12:

“Subject to termination upon the terms herein-after [1015] in this paragraph Twelve provided, Defense Corporation hereby agrees to sublease the Site and to lease the Facilities and Machinery to be acquired hereunder, and does hereby sublease the Site, and leases the Facilities and Machinery to be acquired hereunder, to Lessee and Lessee does hereby lease and sublease the same from Defense Corporation for a term ending December 31, 1947, which term, upon its expiration, shall be automatically extended, subject to similar termination for an additional period ending December 31, 1949.”

(Testimony of Tom Mason)

When you arrived at the opinion as to market value that you have here expressed as to this lease and option contract, was it your understanding that the two dates mentioned in the portion of paragraph 12 that I have just read were expiration dates within the terms of paragraph 15 of Exhibit W, where it states:

“Upon the expiration or termination of this lease or extension thereof pursuant to paragraph Twelve hereof, or upon cancellation of this lease or extension thereof pursuant to clause (a) of paragraph Fourteen hereof (unless such cancellation shall have been effected because of a violation by Lessee of the contracts referred to in said clause (a), Lessee shall have and is hereby granted, for [1016] a period of ninety days after such termination, expiration, or cancellation (hereinafter referred to as the ‘Option Period’) the right and option, by written notice to Defense Corporation and to the Maritime Commission, to purchase all but not part of the Site, Facilities and Machinery at the following prices”?

A. If I understand your question correctly, you want to know if I considered whether the word “expiration” in paragraph 15 would be applicable to the dates of 1947 and 1949? [1017]

Q. As given in paragraph Twelve. That is correct.

A. Yes; I assume that, if the Tavares Construction Company were in possession of the property as of 1947 or as of 1949, that that would be a date of termination.

Q. What was your understanding of the contract provision as to that still being the date of termination or date upon which the Tavares Construction Company might elect to exercise its option to purchase in the event the



(Testimony of Tom Mason)

government requested the right to priority use of the facilities and machinery and Tavares Construction Company consented and granted such right of priority use to the government?

A. It is my understanding of that particular phase that the Tavares Construction Company did have an interest to that date but, in my opinion, it was not valuable and was not marketable and, therefore, had no value.

Q. Do you mean that it is your understanding of the lease and option contract that, notwithstanding the request by the government for the right to priority use and the granting of such right, the Tavares Construction Company would have still had a right to elect to purchase all but not part of the site, facilities and machinery, on either January 1, 1948, or January 1, 1950?

A. I stated that they were still in possession. If they were not in possession, if the lease was cancelled by any other means, for example, like in this condemnation action, [1018] it is my opinion they would not have the right to purchase as of 1947 or 1949.

Q. It is your understanding that by this condemnation action all rights of every character are being acquired that the Concrete Ship Constructors might otherwise have exercised under the terms of this lease?

A. It is my understanding that in this condemnation action, as of December 23rd, the government is taking all of the rights, interest and title of the Tavares Construction Company in and to this Plancor 407, as within their power to condemn any property that is necessary. They are taking all of the rights they had and the Tavares Construction Company, if the rights have any value at

(Testimony of Tom Mason)

all, are entitled to compensation and, if they have not, they are not entitled to anything.

Q. Is it your understanding that, except for this condemnation action, the granting of priority use by the Tavares Construction Company to the government would have in no manner affected or altered the Tavares Construction Company's right as lessee, the priority rights of the government, that is, the right to assign it to another agency without any action to cancel the lease or condemn their rights in it; that they would still have the right to exercise the option? For example, what I mean is this. In this document the Defense Plant Corporation is a governmental agency and it granted [1019] the lease and holds it. If the Defense Plant Corporation transferred that to the Maritime Commission or the Department of Justice or the Forestry Department or any other department, it would be just like if I own a piece of property and it was leased to you and I sold it to somebody else subject to the lease?

A. That is the way that I view that priority phase of it.

Q. Am I to understand, then, that, if the government exercised its right to the priority use, it is your understanding that the Tavares Construction Company as lessee no longer would possess the right to elect to purchase under the terms of the option?

A. I didn't make that statement; no, sir.

Q. What is your understanding with respect to that situation?

A. My understanding with respect to that situation is that the Tavares Construction Company had the right to purchase under the option until that right was taken

(Testimony of Tom Mason)

away from them either by condemnation, as in this case, at which time they should be compensated for it if it was worth anything, or, if in my opinion, it wasn't worth anything, or if another agency of the government took it over and assumed the responsibilities of the Defense Plant Corporation, they would still have that right until they went a step or two [1020] further.

Q. Assume that the government requested and the Tavares Construction Company as lessee granted the right of priority use to the government, is it your understanding that under the terms of this lease and option contract the Tavares Construction Company would thereby be deprived of the right to immediately serve a 10-day written notice of its intention to elect to terminate the lease and, upon the 11th day, elect to purchase in conformity with the option provisions?

A. I don't understand it that way; no.

Q. What is there in that lease which to you causes a contrary understanding?

A. If I understood your question correctly, you stated if they assigned or consented to the priority. You asked me if I thought that took away from them their right to notify the government that they desired to cancel, in order to exercise their option.

Q. That is it, in substance, Mr. Mason; yes; that is correct.

A. Again repeating what I said a minute ago, if they transfer their rights from the Defense Plant Corporation to another governmental agency, that other governmental agency has to assume the responsibility of the Defense Plant Corporation until some provision came up whereby

(Testimony of Tom Mason)

that was de- [1021] nied them, and Tavares would have the right to cancel under the 10-day notice, as I see it.

Q. But you are confusing in your answer a second question which I have not yet asked you. You are assuming in your answer that the Defense Plant Corporation transferred its rights to another department of the government. Now, in my first question I am omitting any such assumption. We will assume that there was no transfer and that the government merely wanted to use this property, the facilities, as contemplated by the provisions of the lease and it had a right to a priority use, whether it wanted the use for one year or throughout the remaining unexpired portion of the lease; that the government clearly had the right here to notify the Tavares Construction Company that it desired such priority use and, clearly, it was the duty of the Tavares Construction Company then to grant to the government such priority use. What is there in this lease that would negative or preclude the Tavares Construction Company from immediately serving a written 10-day notice of intention to terminate the lease, ending all of its obligations as lessee either as to priority or payment of taxes or maintenance or insurance or anything else, and, on the 11th day after the service of such notice, say to the United States government, "I tender my option price and tender a deed to all but not part of the site, facilities and machinery"? [1022]

A. I answered that a little while ago when I said that it was my opinion that the Tavares Company had that right under the priority paragraph in Fourteen.

Q. Do you think that that right so possessed by the Tavares Construction Company as lessee under this lease



(Testimony of Tom Mason)

and option contract would have been a substantial leverage in its hand as lessee in the event that he procured a purchaser who wanted an assignment of lessee's rights under the lease? By that I mean, if the Tavares Construction Company possessed the right to elect to purchase under those conditions, wouldn't the government know, if it refused to consent to an assignment of the lease, the Tavares Construction Company as trustee could immediately exercise its right to purchase and demand a deed and convey the fee title to its prospective purchaser?

A. I didn't understand that part of your question about the government, if I may have that part again, sir.

Mr. John M. Martin: Will you read the question again, please?

(Question read by reporter.)

Mr. John M. Martin: The question is not clear and I would like to withdraw it and restate it, if the court please.

Q. You have previously testified that, in arriving at the conclusion on your part that the lease and option contract had no market value as of December 23, 1944, you considered the fact the lease could not be assigned by the Tavares Construction Company without the consent of the government. [1023]

I am asking you now if the Tavares Construction Company has the right, in the event the government refused to consent to the assignment to a prospective purchaser of the lease, to immediately serve a 10-day notice of intention to terminate the lease and to elect to purchase the land. Wouldn't the lessee, the Tavares Construction Company, be enabled to carry out a sale of the entire

(Testimony of Tom Mason)

shipyard, whether the government consented and liked it or not?

A. Assuming the situation as you have stated it, yes; if they could find a buyer that would pay the amount of money that Tavares would have to pay in exercising his option, that is, a sum of money that the jury in this action will set up for the value of the land for National City, plus the sum of money that has been stipulated in one of the articles on trial here, \$2,141,000—if he could find a buyer that would pay in excess of that, he could make the sale. Otherwise, he couldn't sell it.

Q. Now, let's move to the second exception which you originally had in mind and that is one where the Defense Plant Corporation sees fit to assign its right, title and interest, to this shipyard to another branch of the government and the government sees fit to exercise the right of priority use, either for its own purposes or for the use of others under the government. Is it your understanding that, under that kind of a situation, the contract here authorizes the govern- [1024] ment to dismantle or remove or otherwise destroy the facilities, improvements or machinery, erected thereon, under the terms of this lease, or was there an obligation on the government to maintain them?

A. It is my understanding that there was an obligation on the part of the Tavares Construction Company to maintain the facilities. I read nothing in the contract that would warrant under merely an assignment the right to destroy the property by either party.

Q. So far as you understand this contract, you gather from the contract that it was the contemplation of both the government and the Tavares Construction Company

(Testimony of Tom Mason)

that the shipyard facilities would remain in existence and would not be destroyed by either party, without the consent of the other, until the expiration or termination of the lease in accordance with the terms of the contract?

A. That is true as far as it goes. One other step in that is the acquisition of the rights of either the Tavares Construction Company or the Concrete Ship Constructors by the right of eminent domain or condemnation, and from that point on out I wouldn't pass on what could be done with the facilities.

Q. So that, except for the right of the government to condemn and acquire the lease and option rights, you understand that this contract did contemplate that the facilities, [1025] improvements and machinery, would remain in existence until the lease was either terminated or expired in accordance with its terms?

A. Yes; either terminated, expired, or by some other arrangement that we can't foresee at this time that might come up for the cancelling of it or the acquisition of it by the government. [1026]

Q. Of course, if the lessee violated the terms of the lease, the government had a right to terminate the lease?

A. Well, on any condition specified in the lease whereby it could be terminated, violation, or bankruptcy, or any one of the features that would permit its cancellation, or the lack of the necessity for building ships, either one or both parties could cancel.

Q. What do you find in the lease, Mr. Mason, that gives you the understanding that Tavares Construction Company, as trustee, is to pay taxes, insurances, main-

(Testimony of Tom Mason)

tenance, watchmen, and so forth, during any period of priority use that may be exercised by the government?

A. Without rereading the lease, I don't know if I can quote it, but under my assumptions, as I stated a few moments ago, that the responsibility of maintaining and keeping the plant in condition so long as it remained with the Tavares Construction Company, it would be necessary to do those things in order to protect the property.

Q. Then you have arrived at your opinion as to the fair market value of this lease and option contract, with the understanding on your part that, notwithstanding the government might exercise a priority use, for instance, from December 23, 1944, until January 1, 1950 that all expense of taxes, insurance, maintenance, and so forth, was to be borne by the lessee, Tavares Construction Company? [1027]

Mr. Landrum: That is objected to, if the court please, in that it is indefinite. This contract provides for a priority use of all or some part. Counsel asks this question so that the witness will not understand whether he means a priority of all or only a part.

Mr. John M. Martin: I will divide the question in obedience to counsel's objection and ask the witness, first, to answer the question on the assumption that the government priority is for the entire period and for all of the facilities and machinery.

A. I did not make my valuation on that method. I valued that option under the assumption that it could be exercised, although of the opinion that the option did not exist. Based on the assumption that it could be exercised, I had to assume they had an option in order



(Testimony of Tom Mason)

to place a value on it. It is my opinion that there was no option as of the date of valuation, namely, December 23, 1944, but in order to arrive at a figure I assumed that there was an option, that they did have the right to purchase under the agreement, and, therefore, set out my opinion of what I thought they would have to pay. That is, when I say "what I thought," I mean what I thought might be a reasonable figure for the land, but that figure might be altered one way or another by the jury in this action and who may make it higher or lower than my figure, but whichever way it is, why, it [1028] affects that opinion just that much, plus the agreed sum for the facilities. Then I made an appraisal of the market value of the property, as I saw it as of December 23, 1944, and my opinion of the value was considerably less than the figure that Tavares Construction Company would have to pay for the property.

Mr. John M. Martin: Will you read my question, please?

(The record was read.)

Q. By Mr. John M. Martin: Can you answer that question, Mr. Mason?

A. I think the first statement I made in my answer answers the question, if I am not mistaken.

Q. To make it a little more clear as to just what I am trying to solicit your aid and assistance on in explaining this contract, I direct your attention to paragraph 14 of the lease. At the bottom of the page you will note the subhead:

"or (b) the government shall request priority for itself or others with respect to the use of the facili-

(Testimony of Tom Mason)

ties to be provided hereunder and, Lessee shall fail or refuse to give such priority.”

Is it your understanding that that means in that provision that priority may be requested for a portion of the facilities, or must such priority relate to the use by the government with respect to all the facilities to be provided hereunder? [1029]

A. I hadn't given that particular phase of it any thought before, but it might be construed to be all or part. That would possibly be more or less of a—

Q. Let us assume then for the purpose of my next question that we first construe it to mean a priority use to the government for all of the facilities to be provided under the lease, and further assume that such priority use was requested by the government and granted by Tavares Construction Company for the entire period remaining in the lease, or up until January 1, 1950, what then is there in this contract that you understand to mean that, notwithstanding the possession and use under the priority, as exercised by the government throughout the remaining period of the lease, that the Tavares Construction Company, as lessee, is still obligated to pay the taxes, insurance, maintenance, and so forth? Is there any particular portion of the lease that you can direct my attention to which will aid me in arriving at your understanding, Mr. Mason?

A. I don't recall, without going through and reading it, but it is my understanding that the responsibility of maintenance is, as I stated in answer to a similar question a few moments ago, with the Tavares Construction Company as long as they are in possession of the property. Now, if they were not in possession of the property by

(Testimony of Tom Mason)

priority, and still had not been canceled out of the lease, the lease had not [1030] been terminated or taken away from them, I would assume that the agency that was in full charge of the property and the agency that would prevent them from occupying or utilizing any portion of it would be responsible for the equipment thereon, if granted a priority under this contract. But that statement is made with the thought in mind that the Tavares Construction Company would not even be permitted on the property, that the agency would take over the whole property, as I understood counsel's question.

Q. In other words, we both have in mind in the answer and in the question just given, that that is the exercise by the government of a prior use as to all of the shipyard and its facilities, and not just simply as to some small portion of it.

A. That was my understanding of the question, yes.

Q. Very well. Then, Mr. Mason, what is your understanding of this lease and option contract, as to the rights of the lessee, Tavares Construction Company, in the event the government exercised such right of prior use by one of its other governmental departments, and thereupon the government proceeded, without the consent of the Tavares Construction Company, as lessee, to dismantle and remove, or otherwise completely destroy these facilities and machinery.

Mr. Landrum: That is objected to, your Honor please. It is improper cross-examination. They had not done so on [1031] December 23, 1944. If counsel wants to go into all that happened after that, they could not have elected because they are cut off on the 23rd day of December, 1944.

(Testimony of Tom Mason)

Mr. Martin. I am assuming, if the court please,—

The Court: We have to make assumptions in these cases. Otherwise there would not be any way to arrive at a judicial determination of the problem. These assumptions, ladies and gentlemen, are for the purpose of testing the value of the opinion. It does not mean these assumptions are a reality. If they were, they would be testified to as facts. There must be hypothetical assertions in the nature of assumptions in these questions. I think the Supreme Court clearly stated in the Miller case that you have to adopt practical methods, and we have only the implements which are available. We cannot construct situations that do not exist. We have to assume certain things to exist. The purpose of those assumptions is not to establish that they did or did not exist. It is to test the opinion of the witness so that the jury may reach an estimate as to the value which they are going to give it. Overruled.

Mr. John M. Martin: Will you read the question, please?

(The question was read.)

The Witness: And you mean that question to exclude the right of arbitration, and so forth, as set up?

Q. By Mr. John M. Martin: No, I am not assuming [1032] any thing except an assumed state of facts in that question, and to make it more clear I will add this: We will assume that no condemnation action is filed. You understand that? And I am assuming the government has requested the Tavares Construction Company and they have granted the right of priority use for, we will say, the entire unexpired portion of the lease or until January 1, 1950. Then I want you further to assume that the



(Testimony of Tom Mason)

government or some department should decide that it wanted to dismantle or remove, or otherwise destroy these facilities, so that under my assumed state of facts when the lease expired according to its terms on December 31, 1949, there was nothing remaining in this shipyard excepting the land, the site, as improved. What is your understanding as to whether under the lease and option contract Tavares Construction Company, as lessee, would then have the right to elect to purchase the site at the acquisition cost of such site to the government, excluding from the option price the entire \$2,141,236.49, as calculated in Exhibit Q.

Mr. Landrum: That is objected to, if the court please, in that it excludes or includes within the question propounded the amount of moneys expended by the government of the United States in the making of this very value as to which he is asking now.

The Court: I am inclined to think that vitiates the [1033] question, but I wish you would read the question, please.

Mr. Landrum: May I make the further statement, your Honor please—

The Court: Now, just a moment. Wait until the question is read. It is difficult enough to do it without interruption.

(The question was read.)

The Court: I think the question is proper. Overruled.

The Witness: I don't see how you could exclude the facilities, the price paid for the facilities of \$2,141,236.49 from the price that Tavares Construction Company would have to pay, because the lease specifically says all, the

(Testimony of Tom Mason)

cost to the government of all those things, so that, in my opinion, in 1949 or 1950 Tavares Construction Company would still have to pay the price that the jury in this action puts on the naked land before they had improved it, plus the cost of facilities.

Q. By Mr. John M. Martin: And in testifying as to your opinion as to the fair market value of the lease and option contract as of December 23, 1944, you gave no consideration, as I understand it, to the amount which the option price would be in the event the facilities and machinery were either dismantled and removed or completely destroyed prior to January 1, 1950?

A. No. In my opinion of the price that Tavares [1934] Construction Company would have to pay as of December 23, 1944, I could not conceive the destruction of the facilities by anyone else, and that if he wanted to exercise the option, that that is the sum of money that he would have to pay.

Q. Now, the option price that you have been talking about, as I understand it, is the formula (b) as to price under paragraph 15 of the lease; is that correct?

A. That is correct, yes.

Q. And formula (b) sets forth a schedule of depreciation as to the facilities and machinery?

A. That is correct.

Q. For various classes of facilities; is that your understanding?

A. That is correct. Class 1, five per cent; class 2, ten per cent; and class 3, twenty-five per cent.

Q. Then finally winds up with the provision then under paragraph 3 of formula (b) in paragraph 15, "pro-

(Testimony of Tom Mason)

vided, however, that the minimum residual value on all items shall be 15%”

You understand by that provision just read, however, that the option price as to the facilities and machinery should at least equal the minimum residual value on all items of 15 per cent, notwithstanding the fact that under the assumed state of facts I have just given in my previous question the government, without the consent of the Tavares [1035] Construction Company, might have dismantled and removed, or otherwise destroyed, all of the facilities and machinery.

A. It is my understanding—

Mr. Landrum: If the court please, I object upon the ground and for the reason it is improper cross-examination and an improper statement of the market value. It is an attempt to show damage for violation of the contract.

The Court: Of course, the term used is “just compensation.” The courts have, in interpreting that phrase, used various expressions, “actual value,” “market value,” “just value,” and other expressions which are judicial connotations of that provision of just compensation. I don’t know why we should not enlarge it so as to make it all-inclusive. Objection overruled.

The Witness: It is my understanding that that 15 per cent clause in clause (b) of paragraph 15 is that assuming the shipyard was in operation for 10 or 15 years, and we were at war and the necessity for building ships prevailed during that length of time, and the facilities were used for that length of time, and the option was exercised at that particular time, that they would still have to pay 15 per cent of the cost to the government,

(Testimony of Tom Mason)

even though they had worn out the machinery in the construction of the shipyard, if they desired to exercise the option. In other words, what I am trying to say is that that factor has to do with the [1036] depreciation factors and has nothing to do with any destruction, razing or destroying by any other governmental agency of any part of parcel of the facilities of this shipyard. That is my interpretation of it.

Q. By Mr. John M. Martin: Then am I to understand from your last answer, Mr. Mason, that even though the government, under the exercise of its prior use, had for some reason seen fit to remove, dismantle or destroy these facilities, that the depreciation schedule set forth in paragraph 15, sub-head (b), for determining option price would still be followed?

Mr. Landrum: That is objected to upon the ground and for the reason we are concerned here with December 23, 1944, and what the government might do thereafter is incompetent in this case.

Mr. John M. Martin: It is not offered, if the court please, for the purpose of showing what the government might do thereafter, but merely for the purpose of getting at the witness' understanding of this contract.

The Court: Will you read that question, please?

(The question was read.)

The Court: Overruled.

The Witness: I would say that it would be followed for all of the facilities that were there, and, for example, I have this in mind: they added to this yard and took some [1037] materials away from there, and sold some to other shipbuilding yards during the life of the yard. There were adjustments made. If they took a piece of



(Testimony of Tom Mason)

material away, a piece of machinery away from this yard and took it to another yard, they adjusted their expenditures on this yard by a deduction. If another agency under priority moved in on this property and destroyed or razed or completely demolished every piece of property, there would be an adjustment made, if it would all be eliminated. If some of it was still in existence, they would have to pay for it. There would be an adjustment made. I don't think that Uncle Sam, or anyone else, would do anything else but that, and if they took those gantry cranes that show around those dry docks and moved them up to the California Shipbuilding Company, or up to Seattle, or to some other shipyard, I don't think Tavares Construction Company would be expected to pay for that, if they exercised their option. If the Navy took over one of those cranes, and put it over on the destroyer base, I think there would be an adjustment made for it. What the adjustment would be, I don't know, because it would have to be made as of the time the thing happened. I can't see where if, as counsel stated or included in his question, or tried to include in his question, and we will assume they removed everything, and the government was still occupying the land only under the priority in 1949, or 1950, on December 31st, [1038] and all that was there was the land, then I presume that all Tavares would have to pay would be the market or the cost to the government of the land. I don't see anything different, and I think that is common sense.

Q. By Mr. John M. Martin: I think I understand your answer, Mr. Mason, where you use the illustration, for instance, as to a gantry crane. You are referring to these mechanical derricks or movable derricks indicated on the model? A. Well, I am referring to—

(Testimony of Tom Mason)

Q. But let us take the situation where I am trying to get at and where I have in mind these four graving docks or wet docks, which instead of being portable machinery, have been referred to by some witness as a depression in the land, in the site itself. Let us assume for my next question that, for instance, the government decided during the period of possession by it under its priority use that it wanted to use the areas occupied by graving docks 1, 2 and 3 for some other purpose than a graving dock, and in the accomplishment of that purpose completely removed the graving docks as to sheet piling and material construction, and back-filled them, and left intact, we will assume, only graving dock No. 4.

Now, to be sure that I understand you, let us further assume that a calculation of the option price from Exhibit Q as to these three graving docks 1, 2 and 3 that have been [1039] removed or back-filled,—that there is included in the option price of the facilities and machinery as set forth in Exhibit Q the sum of approximately \$514,286 as the option price as of December 23, 1944, for graving docks 1, 2 and 3. What then would be your understanding in the event Tavares Construction Company exercised its option to purchase, as to how the contract contemplates determining of the option price, with the dry docks 1, 2 and 3 having been removed or back-filled?

A. It is rather difficult to assume a hypothetical situation of that kind, wherein the government would allow the Tavares Construction Company to still be in possession of the option, but assuming that that was the case and the Tavares Construction Company wanted the dry docks, the government would either have to excavate

(Testimony of Tom Mason)

them again, if they filled them, or make some adjustment for the removal of them.

Q. What I am getting at is the understanding under the contract, that there would be a contract obligation in the making of that adjustment to eliminate the entire depreciated value, as calculated in Exhibit Q, for those three graving docks. In other words, would a credit of the exact amount, \$514,000, as set forth in Exhibit Q, be allowable to Tavares Construction Company, as lessee, in the form of a deduction in the amount of \$514,000, approximately, from the total option price for the purchase of these shipyards? [1040]

A I don't think so, for the reason that we are talking about the purchasing of a shipyard in one end of it and a dismantled piece of property in the other. It is hard to reconcile the facts with the hypothetical situation. If you take the cold words of the contract, they have to pay the cost to the government, plus—or, less certain depreciated factors, not exceeding a total depreciation of 85 per cent, or 15 per cent residual, as stated therein. I can't conceive quite that situation actually being, or, I can't answer it as a hypothetical question because it is a little far-stretched, as I would see the operation. If the situation as counsel indicated prevailed, I am satisfied in my own mind that some means or measure would be exercised under the contract where Tavares Construction Company would be out, even to the extent of the action that took place, as exemplified here in this court. His rights would be condemned and he would be cut off before 1950, or 1947, whatever the date is. [1041]

Q. By Mr. John M. Martin: But, except for condemnation or a termination of the lease in conformity

(Testimony of Tom Mason)

with its own terms, is it your understanding of the lease and option contract that both parties, that both the government and the Tavares Construction Company, contemplated by that contract the continued existence, for instance, of these four graving docks I have referred to until the expiration or termination of the lease, in conformity with its terms?

A. I don't quite understand. May I have it again?

(Question read by reporter.)

The Witness: I would say yes; that it was the contemplation of both parties that the shipyard would remain intact until such time as it was terminated or, by agreement, was dissolved or was condemned, as in this action.

Mr. John M. Martin: That is all.

#### Redirect Examination

By Mr. Landrum:

Q. Mr. Mason, counsel has asked you with relation to something which might take place in the year 1950. Will you tell this court and jury the main reason that you reached the conclusion that that paper, Exhibit W, could not be sold for a profit?

Mr. Crouch: I object to that as not proper redirect examination.

The Court: I think he has told us but he may tell it [1042] again. Overruled.

The Witness: To put it as simply as possible, assuming that I, as a broker or as a business opportunity broker, licensed in the State of California, was presented a document of that nature and asked to sell it, or if one of my clients had an opportunity to buy it and came to me about buying it, I would go through the document, as I



(Testimony of Tom Mason)

did in preparing for this case, and point out the many ifs, ands and possibilities of this and that happening. It would, in my opinion, make the possible profit in it for the person who was going to sell the option so speculative because of things he would have to do, following the contract or lease, considering it by its four corners, the provision to pay the cost to the government, which was \$2,141,000, plus a sum for the land of, we will say, \$250,000, which would make \$2,406,000, or some such sum as that, that he would have to pay if the option was exercised. And in making an analysis of the property and comparing it with shipyards elsewhere, and based on my knowledge of what happened after the last war with the Concrete Ship yard on Mormon Island in Los Angeles Harbor and the Wooden Shipyard on Mormon Island in Los Angeles Harbor, and realizing we were out of war at the moment, it would be entirely too speculative and I can't see where a willing buyer coming in to buy the paper or the option or the assignment of the lease, if it could be assigned, should pay five cents for it. [1043]

Mr. Landrum: That is all.

#### Recross Examination

By Mr. John M. Martin:

Q. When you say, in your opinion, it is entirely too speculative, do you mean that the element of value would be entirely too speculative or that the element of contract rights as mentioned in the lease and option contract would be too speculative?

A. The element of certain rights coming into being; for example, the right to remain on the property, the right to an option. That was speculative. As evidenced in this

(Testimony of Tom Mason)

court, it was cut off on December 23rd in a condemnation action. There are all of those possibilities in there, that he might be cut off as he was cut off. It was too speculative.

Q. The element of condemnation, as to the right of the sovereign to condemn, is an element that is inherent and exists in every piece of property in the United States of America, is that not correct?

A. There is no question about that. If the necessity requires it, the State, City or County or federal government and certain branches of your local governments may condemn property if the use is for the public.

Q. Would you say, then, that the fact, for instance, by [1044] way of illustration, that the government might desire in time of war to condemn the State House at Sacramento, belonging to the State of California, for government purposes, that the fact that the government might possess such a right would prevent you as an appraiser from arriving at a fair market value of that State House in the event it was to be offered upon the open market for sale by the State of California?

A. No. The fact that it is owned by the State would mean they would condemn it after a proper study, the same as I did in this action.

Q. Then, why isn't it fair to remove the element of speculation as to this lease and option contract to be condemned, when you form your opinion as to the fair market value of the lease and option contract?

A. That is only one of the phases that makes it speculative.

(Testimony of Tom Mason)

Q. What are the others, so that I may understand them?

A. If I was sitting down across the table, with counsel, as a business man, talking about it, we would take the various items, the right that was conveyed to the Tavares Construction Company to negotiate. We would discuss that and find that it was the right to negotiate the same as anybody else has and a right to assign the option or the lease subject to the consent of the government. It might be questionable as to whether he could obtain that. The right to exercise the op- [1045] tion coming into being under paragraph Twelve, as of a certain date or at the expiration of the automatic-extended term of the lease, December 31, 1949, in the future. The right of the government to acquire it for other agencies. The right or the possibility of the option coming into existence under paragraph Fourteen. All of those things would throw up a question as to whether it would be a piece of paper that you could market, and then the further thing that you would have to estimate the value of the property as it was of the date that you were negotiating for the paper and, following that, the formula set up, and estimate the market value of it, and, if the market value exceeded the formula that he would have to pay, it might be conceivable that somebody would pay a few cents for it. But, in my opinion and from my analysis of it, the market value was lower than that sum of money. Hence, there was no market value in it.

(Testimony of Tom Mason)

Q. In order that I may be sure that I understand you, when you stated as your opinion that the option had not come into being as of December 23, 1944, will you state just what you mean?

A. I mean that the option had not come into being; that Tavares did not exercise an option on December 23rd or prior thereto, that is, exercise any rights that he might have had to an option prior to the date of valuation herein. [1046] He did not take these steps necessary to give him the option.

Q. Were those rights to take the necessary steps to exercise an option a portion of the rights that were here condemned and which you have included in your valuation?

A. Oh, yes.

Q. So that, if they were acquired by the government in this proceeding, Mr. Tavares would have had no right to exercise them? Is that your understanding?

A. He had no right to exercise the option after December 23rd. Up to the cutting off on December 23rd, he had the right to exercise the option but he did not.

Q. But am I to understand that it is your understanding of this contract that you can include in your opinion as to the fair market value of the lease and option contract nothing whatever for the value of the option for the reason that it had not come into being as of December 23, 1944?

A. It is my understanding of what I did include in my opinion of value that it was all the rights that Tavares had in and to and by virtue of the lease agreement, Plancor 407.

Q. But your understanding of those rights, as I understand your testimony, excluded therefrom any right



(Testimony of Tom Mason)

and notice to terminate as a condition precedent to electing to purchase because, by the very act of condemnation, the lease and option right in toto ceased to exist on December 23, 1944?

A. You misunderstood me or I possibly didn't make my- [1047] self clear. Up to the filing of the action for the taking of the property, this action here, December 23, 1944, the Tavares Construction Company had the right to exercise an option following a certain prescribed rule in this document. When the government stepped in and took that right away from him, even though he didn't exercise it, he is entitled to appear here in court and attempt to get whatever he feels that he is entitled to, and my opinion is that the market value of all of those rights, including the option right, is that it had no market value as of the date of valuation.

Q. What I want to be clear about, it is my understanding that you based that opinion, Mr. Mason, as to value upon your conclusion, from an examination of this contract, that the option right had not come into being or existence as of December 23, 1944, is that correct?

A. No, Mr. Martin. I said that he had the option right but the option itself had not come into being.

Q. What do you mean by that last statement, that the option itself had not come into being? Do you mean for the purpose of your appraisal as to value?

A. No. I mean that Mr. Tavares had not, and, when I say Mr. Tavares, I mean the organization that was in the lease,—that he had not exercised their option and not said to the government, "I am going to take that property in accordance with the option," and the government said, "Okay; [1048] you can take it." He didn't do that up

(Testimony of Tom Mason)

to December 23rd. Up until the government took it, he had the right to do that and he should be paid for that right, which, in my opinion, is nothing.

Q. In other words, as I understand you, you included in your opinion as to value or took into consideration as one of the elements that, the Tavares Construction Company not having elected to purchase or serve a 10-day notice to terminate prior to December 23, 1944, the service by the lessee, the Tavares Construction Company, of notice either to terminate or to elect subsequent to December 23, 1944, would have been an idle and useless act?

A. I think that I answered that, in substance, earlier in my testimony, wherein I stated that I had to assume that the option had come into being, in order to appraise it, and that is what I did. In my appraisal of the option, or lease coupled with the option, I took the position in my own mind that the Tavares Construction Company had gone through the routine of sending a notice of a 10-day cancellation, had exercised the option and had the option in their possession. That is one of the things that I took as a basis of my appraisal of this option.

Q. But did you also take into consideration, Mr. Mason, that, except for termination of this lease and option contract prior to January 1, 1950, the Tavares Construction Com- [1049] pany as lessee would also have had the right to elect to purchase the entire site, facilities and machinery, as of January 1, 1950?

A. I could have placed that interpretation on it but I made no calculation to cover it because it was so far in the distant future, and, knowing what had happened with similar yards after the last war, I couldn't see where anyone would pay anything for the option.

(Testimony of Tom Mason)

Q. In other words, you reached the conclusion that an option to purchase 100 acres of real estate at a time or period fixed five years, we will say, in the future, was the fixing of such a remote period as to make it unworthy of consideration in arriving at a fair opinion as to market value? A. As of the date of valuation; yes.

Q. How, then, do you compare that remoteness with an illustration, for instance, where these tideland leases are leased for a long period of 25 to 50 years, on a graduated rental basis of say from 1 cent per square foot up to 5 cents per square foot?

Mr. Landrum: If the court please, that is objected to as not proper recross examination.

The Court: Sustained.

Q. By Mr. John M. Martin: Do you in your calculation—

The Court: I think I should explain that ruling so that [1050] counsel will not misapprehend the reason for it. The question leaves out of consideration the exhibit which is the basis of calculation.

Mr. John M. Martin: Thank you, your Honor.

Q. In this lease Exhibit W, the lease and option contract, I have understood you to say that you have given full consideration to all of the elements that would enter into the determination, in your opinion, of the fair market value of the lease and option contract?

Mr. Landrum: If your Honor please, I object to that upon the ground and for the reason it is not proper recross examination. He went into all of it on his prior cross examination of this witness. The only question I asked this witness was one question and that was what was his main reason for reaching that conclusion.

(Testimony of Tom Mason)

The Court: I think you went into most of this but you can go into that further after the recess. Ladies and gentlemen, we will take a recess for about five or ten minutes. Remember the admonition.

(Short recess.)

The Court: All present. Proceed.

Mr. John M. Martin: I have finished my recross examination, if the court please.

Mr. Landrum: Nothing further, Mr. Mason. Thank you, sir. If the court please, the government rests. [1051]

The Court: Is there any rebuttal, gentlemen?

Mr. Muir: The defendants Johnson do not wish to offer any rebuttal.

Mr. Monroe: We have a very few matters, your Honor. First, by reference, I would like to have in the record Article 15, Section 3, of the California Constitution.

The Court: I don't remember it offhand.

Mr. Monroe: It has to do with the tidelands, with the limitation. It is very short. May I just read that?

The Court: Yes.

Mr. Monroe: "Section 3. All tidelands within two miles of any incorporated city or town in this State, and fronting on the waters of any harbor, estuary, bay, or inlet used for the purposes of navigation, shall be withheld from grant or sale to private persons, partnerships, or corporations."

And we would like, next, to offer, if your Honor please, Chapter 46 of the Statutes of California for the year 1923. That is our grant and is, in fact, our deed and I believe it should be read into the record.



The Court: Very well.

Mr. Monroe: I will read this. "Whereas, Since the admission of California into the union, all tidelands along the navigable waters of this State and all lands lying beneath the navigable waters of the State have been and now are held in trust by the State for the benefit of all the in- [1052] habitants thereof for the purpose of navigation, commerce and fishing; and

"Whereas, It is the duty of the State to govern, administer and control such lands and to improve and develop navigation, commerce and fishing thereon and thereover; and

"Whereas, The State has not the general power of alienation of such lands, but may, when the interests of commerce, navigation and fishing require it, convey to municipalities limited and defined areas of such lands with the power to govern, control, improve and develop the same in the interests of all the inhabitants of the State; and

"Whereas, The conveyance to the City of National City of the lands hereinafter described, together with the right to govern, control, improve and develop the same will result in great advantage and benefit to all the inhabitants of the State; it is provided:

"Section 1. There is hereby granted and conveyed to the City of National City, in the County of San Diego, State of California, all of the lands situate in the City of National City side of said bay, lying and being between the line of mean high tide and the pierhead line in said bay, as the same has been or may hereafter be established by the federal government, and between the prolongation into the bay of San Diego to the pierhead line of the

boundary line between the City of National City and the City of San Diego, [1053] and the prolongation into the bay of San Diego to the pierhead line of the northerly line of the street commonly known as Thirtieth Street, same being the southerly boundary of the City of National City, California.

“Sec. 2.

“The City of National City shall have and there is hereby granted to it the right to make upon said premises all improvements, betterments and structures of every kind and character, proper, needful and useful for the development of commerce, navigation and fishing, including the construction and operation of a municipal belt line railroad in connection with said dock system.

“Sec. 3. No grant, conveyance, or transfer of any character shall ever be made by the City of National City of the lands described in Section 1, or of any part thereof, but the said City shall continue to hold said lands and the whole thereof unless the same revert or be receded to the State of California. The harbor of National City shall remain always a public harbor and the said city shall never charge or permit to be charged on any of the premises by this act conveyed any unreasonable rate or toll, nor make nor suffer to be made any unreasonable charge, burden or discrimination. In the event of a violation of any of the provisions of this act, the said lands and the whole thereof shall revert to the State of California. [1054]

“Sec. 4. The City of National City—”

Mr. Crouch: Just a moment, if the court please.

(Whispered conversation between counsel.)

Mr. Monroe: I was also going, your Honor, to call attention to the Act of 1925 and counsel has called my attention to it. And may the record show that Sections

4 and 5 of this Act were amended? So I will simply read Sections 4 and 5 as amended. It changes the term from 25 to 50 years.

“Sec. 4. The City of National City may lease for a term not exceeding 50 years any wharves, docks or piers constructed by it, and all such leases so executed shall reserve to the board of trustees of the City of National City, the right and privilege, by ordinance, to annul, change or modify such leases upon the violation of any of the provisions thereof by the lessees as in its judgment may seem proper. The aggregate amount of all wharves, docks and piers so leased by said city shall never exceed seventy-five per cent of all the wharves, docks and piers actually constructed.

“Sec. 5. The City of National City may lease not to exceed an aggregate of seventy-five per cent of the lands conveyed to it by this act, for a term not to exceed 50 years and upon which wharves, docks or piers have not been actually constructed, and, except by consent of the board of trustees of the City of National City under an ordinance of such board duly adopted, such leases shall not be assignable or trans- [1055] ferable, nor shall any lessee have the right to sublet the leased premises or any part thereof without such consent.

“When wharves, docks or piers have not actually been constructed, provided that where any of said lands are now leased for a period of less than 50 years, the City of National City may extend or renew the same or make new leases thereon, except that the term of such extension, renewal or new lease shall be not to exceed 50 years from the date of such extension or new lease.”

Then, going to the 1923 act, "Sec. 6. The State hereby reserves unto itself at all times the reasonable use of and access to all wharves, docks, piers, slips and quays hereafter constructed under the provisions of this act, for any vessel or water craft owned, leased or operated by the State."

We will also offer, by reference, the Act of 1917, Chapter 28. It will be unnecessary to read that in the record at length, your Honor, because it is the same, the 1917 Act, except for Section 6, to which some reference has been made in the evidence, and that Section 6 is as follows:

"Sec. 6. The foregoing conveyance is made upon the condition that the City of National City shall, within five years from the approval of this act, exclusive of such time as said city may be restrained from so doing by injunction issued out of any court of this State or of the United States, and exclusive of such further delay as may be caused by unavoidable [1056] misfortune or great public or municipal calamity, issue its bonds for harbor improvement purposes in an amount of not less than one hundred thousand dollars, and shall, within five years after the approval of this act, exclusive of the time in this section hereinbefore mentioned, commence the work of such harbor improvement, and the said work and improvement shall be prosecuted with such diligence, that not less than one hundred thousand dollars shall be expended thereon within five years from the approval of this act. If said bonds be not issued or said work be not prosecuted and completed as and in the manner herein provided, then the lands by this act conveyed to the City of National City shall revert to the State of California."

That is the only difference. There is no such provision in the 1923 act. We would like to call Mr. Rogers.



FRANK W. ROGERS,

called as a witness in rebuttal by the defendant City of National City, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Frank W. Rogers.

Direct Examination

By Mr. Monroe:

Q. Where do you live, Mr. Rogers?

A. In National City. [1057]

Q. And have you any official position with the City of National City?

A. That of City Clerk.

Q. As such City Clerk, do you have custody of the records of the ordinances passed by the City of National City?

A. I do.

Q. I will call your attention to a lease executed under the date of February 2, 1942, signed by National City by Frederick J. Thatcher as Mayor, to the Tavares Construction Company, and leasing a tract of approximately 18 acres or 800,000 square feet for a period from January 1, 1942, until December 31, 1946. I will ask you whether or not you have examined the records of the ordinances of National City to ascertain whether or not there is any ordinance either authorizing or approving any transfer of that lease to any other person or corporation.

Mr. Landrum: That is objected to, if the court please. It is not proper rebuttal. I consider it as a part of their case in chief.

The Court: It might have been but I think it is a material factor, perhaps not so much so far as the jury is concerned but on other aspects of the case, which the court will have to consider before final decision. Overruled.

(Testimony of Frank W. Rogers)

The Witness: I have. [1058]

Q. What have you found in that regard?

A. I have found no such ordinances.

Q. There is no such ordinance?

A. To the best of my knowledge, there is not.

Q. Mr. Rogers, can you tell us from your examination of the records what payments of rent were made under this lease?

Mr. Landrum: That is objected to for the same reason, if your Honor please.

The Court: I do not believe that is a matter for the jury.

Mr. Monroe: Might I suggest, your Honor, what my purpose is?

The Court: Yes.

Mr. Monroe: My purpose is simply to show that after an alleged assignment to the Defense Plant Corporation no rent was paid; that it has never paid any rent. That is all I want to show.

The Court: Are you going to question that, Mr. Landrum?

Mr. Landrum: No, sir, I will not. I admit it.

Mr. Monroe: That is all.

The Court: It may be material on certain aspects of the matter,—

Mr. Landrum: Yes, I understand, your Honor.

The Court: —which will not be of much interest to [1059] the jury, except it should be in the record so that a proper consideration can be given to that factor at the appropriate time.

Mr. Monroe: That is all.

(Testimony of Frank W. Rogers)

Mr. John M. Martin: Might I ask the witness one question as to one exhibit that has been offered here?

The Court: Yes.

Q. By Mr. John M. Martin: Plaintiff's Exhibit No. 5, I hand you what purports to be a copy and direct your attention to the certificate on the last page thereof. Will you state whether you know, from your knowledge of the records of the City of National City as to whether the ordinance therein referred to was duly passed and adopted?

Mr. Monroe: Pardon me. It refers to a resolution, and not an ordinance.

Mr. John M. Martin: Very well. I correct my statement.

The Witness: I am afraid I can't answer that.

Q. By Mr. John M. Martin: You do not know, of your own knowledge?

A. Not of my own knowledge.

Mr. John M. Martin: Thank you.

Mr. Monroe: If it will help the situation for counsel, I will stipulate that a resolution, as referred to in the certificate, was made.

Mr. John M. Martin: Thank you. I will accept that [1060] stipulation.

Mr. Monroe: That is all, Mr. Rogers.

(Witness excused.)

Mr. Monroe: Mr. Dickson.

DELEVAN J. DICKSON,

called as a witness by and on behalf of the defendant City of National City, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you state your name, please?

The Witness: Delevan J., D-e-l-e-v-a-n J. Dickson, D-i-c-k-s-o-n.

By Mr. Monroe:

Q. Your residence, Mr. Dickson?

A. National City.

Q. What official connection have you with the city?

A. I am the administrative officer.

Q. I will ask, Mr. Dickson, if you are familiar with the area involved in this suit and that is represented by this model that stands before you. I have no particular reference to the structures, but the land itself. Are you familiar with that area?

A. Yes, sir.

Q. Do you remember the occasion of that area having been filled in connection with dredging operations in the [1061] San Diego Bay?

A. I do.

Mr. Landrum: Just a moment. That is objected to, if the court please. It is not proper rebuttal at all.

The Court: Well, are you speaking of tract A?

Mr. Monroe: I am speaking of the original fill. I want to show that that was done before any of these things came up at all. There was some reference by some witnesses that might leave a bit of doubt.

The Court: Objection overruled.

Mr. Monroe: Would you read the question, please?

(The question and answer were read.)



(Testimony of Delevan J. Dickson)

Q. By Mr. Monroe: And when was that?

A. To the best of my recollection, it was in 1939 or the early part of 1940.

Q. At that time was there any transaction between the City and the Government?

A. The transaction that occurred between the City and the Government was on May 2, 1939, when the City of National City voted an area of approximately 96 acres, which extended south from the north city limits of National City. I am referring to tidelands.

Q. Yes.

A. They voted that area to the Federal Government for the use of the United States Navy for military purposes, and [1062] in the negotiations that were held prior to that election Captain McCandless, who was at that time the commanding officer of the Destroyer Base, represented the fact that if the City of National City gave this—

Mr. Landrum: Just a moment. If the court please, I object on the ground that the statement of Captain McCandless is not binding upon the government of the United States.

The Court: Objection sustained.

Q. By Mr. Monroe: Well, the land was actually turned over to the government; is that right?

A. That's right, sir.

Q. And the dredging was actually done in 1938 and '39?

A. That is correct.

Mr. Monroe: That is all.

(Testimony of Delevan J. Dickson)

Cross Examination

By Mr. Landrum:

Q. Just one further question. Of course, you know, do you not, that there was other dredging and other filling done by the Tavares Construction Company later on, when they came in there, which was paid for by the government, do you not?

A. I don't know about that, sir. I was in the Navy at the time.

Mr. Landrum: That is all.

Mr. Monroe: That is all.

(Witness excused.) [1063]

Mr. Monroe: That is all our rebuttal, your Honor.

The Court: Any further rebuttal?

Mr. Sloane: I would like to recall Mr. Brennan, Mr. Joe Brennan.

JOSEPH W. BRENNAN,

recalled on behalf of the defendant San Francisco Bridge Company, having been previously sworn, was examined and testified further as follows:

Direct Examination

The Witness: Do I have to swear again?

The Court: You have been sworn.

The Witness: Yes.

By Mr. Sloane:

Q. Mr. Brennan, will you refer to Exhibit No. 1 and give us some information about the relation of the water area to land area, both being tidelands, so-called? Do you understand from Exhibit 1 that the area marked in green

(Testimony of Joseph W. Brennan)

represents water, as it stood in November, 1942, and that the other colors represent land? A. Yes.

Q. Now, will you state—this is with reference to some testimony given by a government witness to the effect that the City of San Diego collects rent for wharves in the dredged areas of tidelands. Is that the fact?

A. Yes, sir. [1064]

Q. Does the City of San Diego include in those leases water areas? A. Yes, sir.

Q. They are designated in what manner in the leases?

A. We have what we call a tideland lease and a wharf franchise. The wharf franchise takes in the water and the tideland lease takes in the land.

Q. Does the City collect rent for the land and for the use of the water? A. Yes, sir.

Q. Are there any instances in which the City collects rent for the use of the water alone? A. Yes, sir.

Q. In your opinion, does water alone have a rental value in this community? Did it have, in 1942?

A. Yes, sir. It depends on the purpose you want to use it for. For example, an oil dock. As a rule, the oil dock does not require any land. We have the Standard, the Union, the Shell, the Richmond and the G. P., and they just rent an area of water to construct their docks, to pipe the oil up to the fee land in the rear.

Q. Having reference to other industries now which make a combined use of land and water, will you explain how that is done? A. The combined use? [1065]

Q. The combined use of land and water.

A. You mean how it is done?

Q. Shipyards, for example.

A. What do you mean?

(Testimony of Joseph W. Brennan)

Q. How do they combine those?

A. You mean the way we give a tideland lease and a wharf franchise?

Q. Yes, and in actual practice what use would a shipyard make of water?

Mr. Landrum: Just a moment. If the court please, I am going to object. That is not proper rebuttal, what use would a shipyard make of water?

The Witness: They don't drink it.

The Court: We have here a unique use of waterways with respect to shipbuilding. I don't believe that other instrumentalities, such as dry docks would be applicable.

Mr. Sloane: I think not, your Honor. I am referring to the uses which parcel 7 would have, leaving out of account this development by Tavares.

Q. By Mr. Sloane: Referring to the map, can you tell us what high use could be made of parcel 7 in connection with the use of the land area immediately adjoining, I mean, of the water area immediately adjoining?

A. Which one is parcel 7 now?

Q. Parcel 7 is the blue strip which was leased by [1066] National City to the San Francisco Bridge Company.

A. It gets back to the same old story. If a fellow wants to get something on the water front, an industry that has to have water and land, one is no good without the other. If a shipyard wanted to go in there or a cannery, or anything that required water frontage, he would have to have them both, or else he might just as well go out to El Cajon if he does not use or does not require the combination of the two.

Q. In fixing the rental value of the property which requires both land and water, do you take into account, in



(Testimony of Joseph W. Brennan)

the practice of the City of San Diego with which you are familiar, a distinction between the value of the water and a distinction between the value of the land, or do you lump them together, or how is it treated?

A. In making a lease, you mean?

Q. Yes.

A. Well, as a rule we make the land bear the greater amount, and then the water area in front is given the lessee, the right to use. Then he is charged a nominal rental for that. We could just as well put it all in one, or we could divide it up equally between water and land, but we have not done so. As a rule we do it that way where they take both. Then if a man takes a strip of water in front of the bulkhead line and does not require any land ashore of it, then he pays for it as he pays a greater amount. He pays an equivalent [1067] amount so that the land that is cut off in back of the water does not have to bear the same rate that it would have if it had them both.

Q. Let's take the example of where the land to the rear of the tideland is taken by a leasehold carved out in the front, as illustrated by parcel 7, which fronts on the water and cuts off parcel 2 entirely, that is the yellow portion, and a part of parcel 3, which is the blue. Is there any distinction made in the rental value of the cut-off portion of the land, as compared to the frontage portion of the land, assuming that frontage portion is about 218 feet in width?

A. Do you mean, do we have any cases like that?

Q. Yes, do you have cases like that?

A. Where there was leased land there, cut off in the back?

(Testimony of Joseph W. Brennan)

Q. Yes.

A. Interior land. We have got only one that I can recollect and that is where we leased the water in front to an oil dock, and we made him pay as much as if he had taken the land in back, because it detracted from the value of the land, but I don't know of any similar case that we have to that.

Q. But as a matter of reasonable value, would the same rule apply, if it cut off the frontage from the water?

A. We would make the other fellow, we would make him [1068] pay as much; so that we wouldn't have to get as much for the land, if that is what you mean.

Q. Then when reference is made to leases, as stated, by the City of San Diego, am I to understand that the rental value attributed to land covers also the rental value of the water, except where there is some nominal charge made?

A. How is that? I don't understand that.

Mr. Sloane: Would you read the question, please?

(The question was read.)

The Witness: I still don't know what you mean.

Q. By Mr. Sloane: Is that any better on a second reading, or shall I start again?

A. No, sir, I still don't know what you are talking about. If you want to know the difference between the land and water, if there is a difference on that?

Q. You might get at it that way. Tell me if there is a difference, and why, and if you know, who pays for it, and how?

A. Who pays for which?

Q. You let me ask the unintelligible questions.

A. I can't understand that.

(Testimony of Joseph W. Brennan)

The Court: Just a moment, please. Let us take that illustration that you gave about the oil company leasing the water and not having the land. Would that explain it?

The Witness: Yes, sir, that might. If they leased just [1069] the water, it has been our practice in the years we have been making leases to charge more than if they took the land and water, and when they take the land and water we feel that one should go with the other. For example, a shipyard has to run its ways out in the water, and a cannery has to have piers to bring their fish ashore, and that sort of thing. Therefore, they have to have them both and can't operate one without the other. So we put the bulk of the rental on the land and give him a nominal rental on the water, in order that he can control the water. For instance, if he did not have some means or option or control over the water anybody could come in and anchor that wanted to and this way he can keep them out and keep it clear of ships.

The Court: Does that explain it?

Mr. Sloane: I think it does.

Q. By Mr. Sloane: Mr. Brennan, since you were in court the other day, have you prepared a schedule showing the rentals in effect on city leases during 1942?

A. I had the office do it. We had more darned fellows going through our records on first one thing and then another, so I didn't know if I was running the office or they were. So I had them go through the records and make this document up. Is that what you refer to?

Q. By Mr. Sloane: Yes.

A. Yes, sir, that was prepared in my office. [1070]

Mr. Sloane: I don't know if this is strictly rebuttal, but I would like to place that in as a summary of the evidence which has been hinted at before.

(Testimony of Joseph W. Brennan)

The Witness: That gives when the lease was entered into and then the rental rate in '42.

The Court: Show it to counsel.

Mr. Landrum: I have seen it, your Honor.

The Court: It is a tabulation.

Mr. Landrum: The exhibit is objected to, first, upon the ground and for the reason that it is incompetent, irrelevant and immaterial, in that it recites leases which are too remote, going back more than 10 years before the date of taking; second, upon the ground and for the reason that it does not state the entire situation with relation to the rental value of those leases, and that it only refers to the rent being received at a certain time, and does not cover the whole period, as evidenced by the exhibit; third, upon the ground and for the reason that it reduces to writing testimony which should be given orally.

The Court: Well, does the instrument which will be marked, for identification,—

The Clerk: Defendants' AA.

The Court: —correctly state all of the leases during the period that is covered by the instrument? [1071]

(The document referred to was marked Defendant San Francisco Bridge Company's Exhibit AA, for identification.)

The Witness: Yes, sir. In other words, what we did, we took the leases the other day, and when I was on the stand, they kept harping on '42, '42, '42, and I was thinking more in terms of the general layout. So we took the leases and, for instance, Arrowhead was granted—

Mr. Landrum: Just a moment. If the court please,—



(Testimony of Joseph W. Brennan)

The Court: Just a moment. They are objecting to that, and I want to find out the purpose. I do not think you understand what is in the mind of counsel and what the court has to determine.

The Witness: Yes, sir.

The Court: Does this instrument which you have before you, which has been marked for identification, contain a tabulation of all of the leases of the City of San Diego during the period that is covered by the document?

The Witness: No, sir.

The Court: Objection sustained.

Mr. Sloane: That is all.

Mr. Landrum: That is all, Mr. Brennan. Thank you, sir.

The Witness: You are welcome.

The Court: You will leave that here, Captain. It has been marked for identification. [1072]

The Witness: Yes, sir.

(Witness excused.)

The Court: Any further rebuttal?

Mr. Crouch: I think we could conserve the time of the court and the jury if we adjourned for lunch at this time.

The Court: You think there will be some rebuttal this afternoon?

Mr. Crouch: A little, yes.

The Court: Ladies and gentlemen, we will take a recess until 2:00 o'clock this afternoon. Remember the admonition and keep its terms inviolate.

Gentlemen, I would like to have counsel remain after the jury leaves.

(Thereupon the jury retired from the court room, and the following proceedings were had outside the hearing and presence of the jury:)

The Court: I think all the jurors are without hearing now. The record will so show.

The court has concluded, gentlemen, that except as to the Tavares interests, the date of taking will be November 10, 1942, as to all interests. I have not been able yet to determine definitely those instructions which will be given and those which will not be given. I am still working on those. Before the argument, and although it is not required [1073] strictly, because this is not an action covered by the Rules of Civil Procedure, I propose to tell counsel exactly what the charge will be. But I shall expect counsel to confine themselves to a discussion of the facts and not the law.

Now, can you give any indication as to when you will be able to reach the argument stage of the case?

Mr. Landrum: So far as the government is concerned, we have reached it now, your Honor.

Mr. John M. Martin: I think perhaps a half hour in rebuttal would cover us, your Honor.

The Court: Then I would like to have some indication from you as to the argument, the length of time that the defense thinks it is entitled to. It has the opening and closing of the argument. Also, as to how you are going to apportion the argument.

Mr. Landrum: If your Honor please, could I say just one word?

The Court: Yes.

Mr. Landrum: I am working under a terrific handicap. I have to go into court in the trial of another case about 2,000 miles from here next Monday morning. If there

is any way that we could expedite this matter by your Honor holding a little later, or something, I would appreciate it very much. That is all I have to say.

The Court: If we conclude the evidence by 3:00 [1074] o'clock today, you might have the opening argument for an hour and a half today. Then tomorrow is Thursday. That is the Seattle case you refer to?

Mr. Landrum: No, your Honor. I am going back to Michigan.

The Court: Well, let's have the various indications first.

Mr. Monroe: Might I suggest—I suppose somebody has to start a suggestion—I would like to have a total opening and close of at least an hour. I probably will not use that much, but I would like at least to feel that I had the privilege of going that long, if it was necessary.

The Court: All of the argument on behalf of the defendant, National City, will be made by you, Mr. Monroe?

Mr. Monroe: I think so, yes.

The Court: Then perhaps we should consult the San Francisco Bridge Company next.

Mr. Sloane: I should like to stake a claim out for an hour and return as much of it as possible to the court. That is for both the opening and closing.

The Court: Then the Johnson interests?

Mr. Muir: Your Honor, I think about half an hour will suffice.

The Court: Now, the Tavares' interests?

Mr. John M. Martin: If the court please, it is quite [1075] certain that I will make the opening argument and Mr. Crouch the closing argument, and I really think that

we will need two hours for the opening and closing combined, in order to cover the picture completely. I would like very much not to be required to start that argument today. I think I could save time if I didn't commence our argument until tomorrow.

Mr. Landrum: Your Honor please, it is absolutely necessary that I leave here on Friday morning.

The Court: You will have to turn it over to Mr. Berrey, then, or wire back there and tell the court that there is an adamant, arbitrary judge out here in California,—

Mr. Landrum: No, sir, I will not do that.

The Court: —that insists upon the government concluding this case and it cannot be concluded in that time.

Mr. Crouch: Your Honor please,—

The Court: Just a moment. That is four hours and a half for the defense. How long do you want, Mr. Landrum?

Mr. Landrum: I will cover it all in an hour, your Honor; all of it.

The Court: I think we ought to shade that a good deal, gentlemen, without any injustice to any of the litigants. I know counsel pretty well. I think I know all of them and I think that you can cover the case pretty thoroughly in less time than that suggested.

The argument will be limited as follows: 45 minutes for [1076] National City; 45 minutes for the San Francisco Bridge Company; one-half hour for the Johnson interests; one hour and a half for the Tavares interests.



The government, of course, will have an equivalent period of time in which to present its argument.

We shall expect, of course, gentlemen, that all of the defendants will present their cases in the opening argument and will not reserve matters to close where the government will have no opportunity to reply.

Then can't you agree, amongst yourselves, without the court attempting to undertake the feature of designating who shall open the argument?

Mr. Monroe: I assume we can. I don't think we will have any difficulty with that.

The Court: We will proceed with the arguments this afternoon, if we finish before 3:00 o'clock, or at 3:00 o'clock.

Mr. John M. Martin: I would like to inquire if it is the thought that we shall follow the same sequence we have heretofore followed?

Mr. Monroe: That is satisfactory with me.

Mr. Sloane: That is satisfactory.

Mr. John M. Martin: All right.

The Court: Is that satisfactory?

Mr. Landrum: Yes. [1077]

The Court: So ordered.

Mr. Monroe: Might I ask one other thing? A suggestion has been made about the form of the verdict, your Honor.

The Court: Yes.

Mr. Monroe: Mr. Landrum has suggested a verdict which, in form, seems all right, but it is one verdict covering all interests, and this thought was suggested, and it

seems to me well taken; that there are several interests, and I refer now particularly to the Johnson interest, a smaller interest. Such a thing might be possible that for some reason the jury might not get together on every feature, and for that reason my suggestion is that separate verdicts be rendered as to the separate interests. I have mine prepared if that will expedite it any.

Mr. Landrum: The government will certainly object to any such suggestion, in so far as the City of National City and the San Francisco Bridge Company is concerned, upon the ground and for the reason that, as I understand it, they should first, as I have set up in the proposed verdict, determine the overall value of the fee, and then allocate from that, for the assistance of the court, what they allocate to the San Francisco Bridge Company. If you give the jury two separate verdicts, they will certainly be confused in that situation, if your Honor please. They could add to the fee value of that property what they give to the San Francisco [1078] Bridge Company.

Mr. Monroe: Well, I assume the court's instructions will properly reach that.

The Court: Have you all seen this proposed form of verdict?

Mr. Monroe: I have seen it.

Mr. Sloane: I have seen it.

The Court: It strikes me that is better than separate verdicts. I appreciate what Mr. Monroe has stated, but that is an eventuality that occurs in every case. It may occur not only with respect to the Johnson interests, but with respect to the other interests.

Mr. Monroe: Might I make one further suggestion about the form of the verdict, and I think it affects directly my interests, and that is this: as the verdict is worded, I of course understand it and you of course understand it, but the jury is instructed they must take anything that is to be awarded to the Bridge Company out of our award. Fine, well and good. The way that is worded, however, there is still the chance that the jury will take the award of the Bridge Company out of our award, that is, write down our award and write down the Bridge Company's award, and the net result will be that we get it taken out twice. [1079]

I have seen so many of those kinds of errors made by juries that I do not like that form.

The Court: What would you suggest as a modification of the wording?

Mr. Monroe: I would suggest there being awarded a sum to the City, a sum to the Bridge Company, and that the jury be instructed that they must first fix the overall verdict and then award to each his part.

Mr. Landrum: Counsel seems to think this is an action in personam and it is an action in rem.

The Court: It seems to me the testimony is pretty clear, those who testified for the San Francisco Bridge Company's interests and the National City's interests, and they have segregated the amounts which they have allocated to the Bridge Company, and also in their statements of the problem have given the balance that would be due to the City of National City.

Mr. Monroe: I understand that.

The Court: If that is argued properly, I do not think there will be any confusion in this verdict.

Mr. Monroe: Does the court care to indicate further one other proposition before we start the argument, because I would like to be informed, if I can. I have taken the position in instructions that I have asked for, that because of the inhibitions contained in the constitution and the statute [1080] that the officers of the City have not the power to transfer, either by lease or by conveyance, or by anything else, any component part of the fee to anyone, and that, therefore, although the Bridge Company may receive properly out of the total award anything that arises by reason of the improvements, or matters of that kind that increase both the value of the fee and the value of the leasehold, that no award may be made because of the mere fact that it is claimed that the City; made an improvident lease to the Bridge Company. As I recollect it, the Bridge Company has made a claim of \$50,000 because the City gave them a lease for less than it was worth.

Mr. Sloane: We are claiming an item of \$125,000 because they had a lease that was worth that much money, and I think we are entitled to a verdict determining that value.

The Court: Which one of your instructions are you referring to?

Mr. Monroe: I think the last one.

The Court: The last one?

Mr. Monroe: The last one, No. 12.

The Court: I will give you the copy I have here.



Mr. Monroe: Yes, No. 12.

The Court: Have you seen this proposed instruction?

Mr. Sloane: Yes, your Honor. It is highly improper, in my opinion. I really haven't taken it seriously. [1081]

The Court: Yes, I think I had about concluded not to give that instruction, and I shall now answer counsel's query directly, that the instruction will not be given.

I have not been able to satisfy the court's mind on some of the other matters, but I think I can do so before the argument is made. This will not be given except as to matters which are accurately stated in other portions of the instructions.

Mr. John M. Martin: May I inquire, your Honor, as to whether there is any objection to counsel in opening argument consuming more than one-half of the allotted time?

The Court: No. I would be very glad to have you do that, because I think you should open the argument in extenso and fully, so that the government knows exactly all of the problems that you are covering.

Mr. John M. Martin: That probably will mean I will take the greater portion of the time allotted us, and I was wondering if there was any objection.

The Court: No. You can say a great deal in an hour, or even in 40 minutes. I once heard it said that if a man could not say a thing in 20 minutes he could not say it in 20 hours.

(Thereupon, at 12:15 o'clock p. m., a recess was taken until 2:00 o'clock p. m.) [1082]

San Diego, California, Wednesday, February 26, 1947,  
2:00 P. M.

(The following proceedings were had in the presence and hearing of the jury.)

The Court: All present. Proceed.

Mr. Crouch: We will call Mr. Joe Brennan.

JOE BRENNAN,

recalled as a witness in rebuttal by and on behalf of the defendants Tavares Construction Company, et al., having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Crouch:

Q. Mr. Brennan, there was some evidence received yesterday from a government's witness, Mr. Tom Mason, wherein he mentioned a number of parcels of tidelands that were held in private ownership. He mentioned the Banning property in Los Angeles, in the west end of the West Basin of Los Angeles Harbor, and a piece of property adjoining that owned by Lucy Rice Banning, and a tideland piece on Mormon Island acquired by the Pacific Coast Borax, and on the westly end of Mormon Island, of the Banning Estate, where the town of Wilmington was formed and the East Basin of Los Angeles Harbor where the Union Pacific owned two triangular pieces of 10 or 15 acres, each on both sides of the Cerritos Channel, and on the channel that runs from Long Beach to Los Angeles Harbor he said [1083] the Union Pacific owned tidelands, and that as "we approach Los Angeles Harbor" the Los Angeles Dock & Terminal Company owned practically all of Long Beach Harbor at one time; that

(Testimony of Joseph W. Brennan)

it sold holdings to the Los Angeles Dock and Terminal Company, and the Southern Pacific owned land that fronts on Channel No. 3 and Channel No. 2 in Long Beach, where they sold some of it to the Los Angeles Soap Company, or Proctor & Gamble. Can you throw any light on the question as to whether those are, in reality, tidelands within the basin or harbor of the municipality? What can you tell us on that subject?

A. Well, to start in, it sounds like they got all of it; that San Pedro hasn't any harbor left. I am not familiar with all of the details of it. All I know is what is applicable here in San Diego.

Mr. Landrum: Your Honor, I submit, if the court please, he can't answer the question.

The Court: I think he has shown by his answer that he can't answer it.

The Witness: What do you mean, I can't answer it?

The Court: There are certain factors that the court will take judicial knowledge of. Some of those are included in your question.

Q. By Mr. Crouch: Will you explain to the jury how it sometimes occurs that there are pieces of land which either be-[1084] came tidelands or where they thought once they were tidelands and they were excluded from that category?

Mr. Landrum: That is objected to, if the court please, as not proper rebuttal of anything.

The Court: I don't know what counsel has in mind, whether an accretion or diminution.

Mr. Crouch: No; I don't have that in mind. Perhaps I can frame a question that will make it clearer.

(Testimony of Joseph W. Brennan)

Q. Will you describe to the jury what determines whether lands are or are not tidelands?

Mr. Landrum: That is objected to, if the court please. It is not proper rebuttal and doesn't go to rebut anything that the witness said.

The Court: I think that is a question of law, largely. There are certain principles of law which are laid down for the ascertainment, by appropriate engineers. After all, the question of tidelands is a question of law that has been settled by the Supreme Court of California. The Banning case was mentioned, in Los Angeles Harbor. Sustained.

Q. By Mr. Crouch: Mr. Brennan, is the question of whether or not lands are or are not tidelands always finally determined by engineers?

Mr. Landrum: That is objected to, if the court please.

The Court: I think that is a question of law. The courts have settled that; that they are not all determined by engineers; [1085] that they are ultimately determined by the courts.

Mr. Crouch: That is right. [1086]

Q. By Mr. Crouch: Now, confining your answer to harbor lands within the City of San Diego, will you give us a little of the history of the development of San Diego Harbor and its effect upon the lands of people who held lands near the ocean?

Mr. Landrum: That is objected to. It isn't proper rebuttal. If there is anything to it, it is in their case in chief, if your Honor please.

The Court: I cannot discern what counsel has in mind. I think it is common knowledge, and the history of



(Testimony of Joseph W. Brennan)

the times would undoubtedly indicate it, so that it would be a matter within the knowledge of the court as to the tremendous harbor development, and the metropolitan aspect of it, in the vicinity of San Diego during the last few years. If that is what you want to show, I think counsel would not be in a very good position with this jury of citizens to argue against a matter of that kind.

Mr. Crouch: Your Honor please, I cannot state what I expect to prove by this witness.

The Court: You can come to the bench and state it. As I say, I cannot quite discern what counsel has in mind.

(Thereupon the following proceedings were had between the court, Mr. Crouch and Mr. Landrum, outside the hearing of the jury:)

Mr. Crouch: I want to show that until the mean high [1087] tideline has been definitely established by court action that no one can know whether or not, when he owned land bordering on the ocean, his lands are or are not tidelands, and that in the establishment of the mean high tideline, the result has been that a considerable portion of property which individuals thought they owned has been taken from them by the establishment of that line and place them within the category of tidelands, and vice versa, that many parcels of property which the owners considered to not be so, or to be considered to be tidelands, when the line was established they found that their lands were under private ownership, and that that is the reason for the instances referred to by the witness Mason.

Mr. Landrum: That would be objected to upon the ground it is not proper rebuttal, and, second, on the ground it is a question of law, and, third, this witness has

(Testimony of Joseph W. Brennan)

indicated already he is not familiar with anything except San Diego Harbor.

The Court: I do not see the materiality of it at all in this case.

Mr. Crouch: I beg your pardon?

The Court: I do not see the materiality of it in this case, regardless of the characterization of the lands, whatever they may be, that had been taken by the government, whether they were tidelands or submerged lands, or other [1088] lands, as to everything that has been taken in this action. What difference would it make?

Mr. Crouch: In my opinion, it goes to this, that we have presented evidence to the jury which would justify them in the conclusion that when the Tavares Construction Company got the fee title to these lands, they were not longer subject to any of these tidelands Acts or Statutes, and they would almost have a monopoly in the class of lands or the title.

The Court: There is a good deal in the record already on that.

Mr. Crouch: Now, the government, to offset that, brings in this witness and they show a lot of lands they claim fall in that category. I want to show they do not.

Mr. Landrum: How can you show it by this witness if he says he is not familiar with it?

Mr. Crouch: You can't show everything by one witness.

Mr. Landrum: It is in their case in chief, unquestionably, and has all been gone into.

The Court: I think so. I do not think it is material. I cannot see the materiality of it. If we had anybody except the government of the United States as the con-

(Testimony of Joseph W. Brennan)

demnor, there might be some feature there that would be proper. I do not mean to say that it would be proper rebuttal or in the case in chief. I don't think it makes any difference how [1089] this witness feels about the tidelands in San Pedro Bay, because we know what they are.

Mr. Crouch: But this came out in their case.

The Court: What is that?

Mr. Crouch: This evidence here as to these instances came out in their case.

The Court: And your cross examination was to show the comparative situation. In other words, these witnesses attempted to show a comparable situation as a basis for their opinion. They have cited these instances. This man is not in that category. He may be a very fine man, and is undoubtedly, but he has his limitations so far as the effect of his testimony is concerned. He apparently does not know much about the litigation in and about Los Angeles Harbor, because we happen to know a good deal about that ourselves.

I think I will sustain the objection. [1090]

(The following proceedings took place in the presence of the jury:)

Mr. Crouch: I understand the objection was sustained?

The Court: The objection is sustained.

Q. By Mr. Crouch: Mr. Brennan, do you know of any tidelands in the Bay of San Diego that are privately owned?

Mr. Landrum: That is objected to. It is not proper rebuttal. It doesn't go to the question at all.

(Testimony of Joseph W. Brennan)

The Court: Overruled. I think, technically, you are correct but I will overrule the objection.

The Witness: No, sir; there is none.

Mr. Landrum: I move that the answer be stricken as not responsive to the question.

The Court: It is just a direct way of getting at it. He should have answered it yes or no first.

The Witness: No.

The Court: We will strike it out if you want it that way.

Mr. Crouch: You make me work awfully hard, counsel.

The Court: Now, will you read the question to the witness, Mr. Reporter?

(Question read.)

The Court: Yes or no.

The Witness: No, sir.

Q. By Mr. Crouch: You have had considerable experience [1091] in the—how many years was it? 29?

A. 29; yes, sir.

Q. —in the 29 years of being Harbor Master for the City of San Diego, in the matter of leasing tidelands to people who wished to establish industries in this area, requiring water transportation, have you?

Mr. Landrum: That is objected to, if the court please.

The Court: Let counsel finish his question.

Mr. Landrum: I understood he had finished it, your Honor.

The Court: Did you finish the question?

Mr. Crouch: I think so, your Honor. Anyway, I will stop there.

The Court: Read it.



(Testimony of Joseph W. Brennan)

(Question read by reporter.)

The Court: It is already in the record that he has but he can say so again if he wants to.

The Witness: Yes, sir.

Q. By Mr. Crouch: Have you an opinion as to whether or not any tidelands in and around the San Diego-National City area, if they were free from the restrictions contained in the various grants of the legislature to the municipalities, so that they could be alienated and sold or leased for an indefinite term of years, and have an unrestricted fee title, would or would not be more valuable than such lands held under [1092] a municipal lease thereof, subject to the restrictions contained in the tidelands acts?

Mr. Landrum: That is objected to, if the court please. It is not proper rebuttal. Second, it is immaterial. I very respectfully request the court, if I am correct, that counsel be requested to not repeat the question.

The Court: I thought that would be obvious. This jury looks to me like a very intelligent body of men and women. That would seem to me to be obvious. You may answer it if you desire but we know what his answer will be because it is an obvious situation.

The Witness: Certainly, I have an opinion; yes.

Q. By Mr. Crouch: Will you state that opinion?

A. Naturally, it would be worth more.

The Court: That would be obvious, wouldn't it, Mr. Brennan?

The Witness: Yes, sir.

The Court: It doesn't take a learned, experienced mariner or harbor manager to indicate such, does it?

The Witness: No, sir.

(Testimony of Joseph W. Brennan)

The Court: If you have any restrictions on something, it would be different than if it was unrestricted, of course.

Mr. Crouch: Yes, your Honor; I realize that and it all led up to this question.

Q. How much more, in your opinion? [1093]

Mr. Landrum: That is objected to, if the court please, as not rebuttal.

The Court: That is a question for the jury; sustained. That is what they are called here for, to use their processes to determine.

The Witness: I—

The Court: Never mind, Mr. Brennan.

Mr. Crouch: I guess I'd better let you go, Mr. Brennan. That is all.

Mr. Landrum: That is all, Mr. Brennan.

The Witness: Thank you. Can I go now?

The Court: As far as I am concerned.

Mr. Landrum: If the court please, I would like the record to show what happened just now. I would like the court to ask the jury if they heard the remark that Mr. Brennan just made as he passed them, and, if they did, I would like to have a record made of it.

The Court: I am sorry if he made any remark. He should not have done so.

The Witness: I said, "I am finished."

Mr. Landrum: You said, "It is up to you fellows."

The Court: I think we understand Mr. Brennan's disposition. I don't think he intended to say anything out of the way.

Mr. Landrum: I hope it is up to them, if your Honor please. [1094]

The Court: Of course, ladies and gentlemen, I apprehend that you are going to take the testimony given on the witness stand and not decide the case otherwise. I didn't hear what Mr. Brennan said. If he did say anything, divorce that from your minds and do not draw any inferences from it that would be unjustified.

Mr. Crouch: The Tavares Construction Company rests.

The Court: Is there any surrebuttal?

Mr. Landrum: If your Honor please, does the government understand that all of the defendants have now rested?

Mr. Monroe: Yes, your Honor.

The Court: That is the understanding of the court and, apparently, that is the situation.

Mr. Landrum: That being true, if your Honor please, the government now rests. And at this time I move the court to strike from the record in this case and to instruct the jury to disregard all evidence as to value in this case by the witnesses for the Tavares Construction Company, and the grounds of this motion are the grounds of the general objection which I have heretofore made is of record in this case, all four points.

The Court: The motion to strike out is denied and the case will be given to the jury with appropriate instructions on the law of the case.

Mr. Landrum: Under your Honor's ruling, I take it it [1095] is not necessary for me to have a specific exception.

The Court: You may have one if you desire.

Mr. Landrum: On this particular question?

The Court: Yes, sir.

Mr. Landrum: I take an exception. The government rests.

The Court: Proceed to the argument, gentlemen. [1096]

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[Arguments to the Jury on Behalf of the Defendants.  
Not printed.]

## ARGUMENT ON BEHALF OF THE PLAINTIFF

Mr. Landrum: May it please the court, ladies and gentlemen of this jury: In the beginning may I not personally express to you my own personal appreciation of the attention which you have given throughout the trial of this law suit, and may I not express to counsel my personal appreciation of the courtesies and kindnesses that they have shown to me as we have gone along.

Ladies and gentlemen, it will be my purpose to sit down with you and discuss the evidence in this case because you took an oath that you would decide it fairly and impartially between the people of the United States and these defendants from the evidence that you hear from that witness stand and the law as it will be given to you by this court.

I shall try to be entirely fair. I shall not speak an unkind word with relation to anyone who has appeared here. I hope, if at some time in the fervor of the moment I may say some things that don't just jibe, you will forgive me for it. I do not mean to do it. If in the little talk that we are to have I say something with relation to the evidence which you feel is not proper and is not in accordance with your recollection of it, then you forget



all about me and decide it from here (indicating), where you live, decide it rightly and justly.

Also, at the beginning, I want to say to you that there [1165] is no man, woman or child who could plead with you any more fervently than I can to give to these people—give to these people—give to these people every dollar to which they are entitled, but not one penny more. And at the beginning also I want to say to you that it is very, very, very important that you should pay particular attention to the law, as it will be given to you by this court. You are the judges of the fact. His Honor will give you the law to apply to those facts. And, ladies and gentlemen, as I said to you some few days ago, if you will decide this case fairly and impartially between the United States of America and these defendants, your greatest recompense will be a consciousness of a duty performed.

I am going to undertake to discuss this case with you very briefly. Sometimes throughout the trial of it I have become discouraged. It hurt a little in here (indicating), where I live with myself, and then it seemed that when I was down, with all of the brilliant counsel on the other side, and my friend Bob and I sitting over here, I seemed to hear a voice that said, "Go on. Go on. Go on." That that sustained me was the voice of the American people.

There have been statements made by counsel in this case, ladies and gentlemen, which, in my humble opinion, did not jibe with the sworn testimony from the witness stand. Justice is not administered by leaving out things, by picking [1166] up a little here, and picking up a little there. Justice is administered by taking the case by its four corners and letting the light of day in on every scintilla of it.

I am sure that in so far as counsel for Mr. Johnson is concerned, he is very earnest, he is very fair, but, ladies and gentlemen of this jury, he said that the people of the United States, whom I have the honor to represent and whom I am very proud to represent in this court room, would try to get this property as cheaply as possible. He talked about gross rentals and capitalized them. Before I get through, you and I are going to talk about this capitalization method of income.

Then, ladies and gentlemen, he said that Mr. Johnson had had no revenue whatsoever since 1942. I say that that was unfair, because you know in this case that as a remuneration, or as an item to take the place of that rental, he will be entitled and he will get from this court six per cent interest on top of everything you give him. Now, is it fair to say that he has lost rentals when he is going to get six per cent on your verdict from November 10, 1942, or until the money was placed in this court for him under the declaration of taking in this case. Then crowning all was his statement that Mr. Schmutz had increased Mr. Goodwin's figures by \$1,000. Ladies and gentlemen, when I was a little boy and we used to shoot marbles, we used to put some marbles in [1167] a ring. We would draw a big ring, and we used a tau to shoot the marbles from outside of the ring, and if we hit some marbles and we knocked those marbles out, those were ours. In those days we would say to somebody who sneaked inside of that line that he "fudged" a little. The matter of fact is that Mr. Schmutz and Mr. Goodwin were not \$1,000 apart, but it was, as I have it here, \$750. If you wrote it down and I am wrong, all right. If I am right, all right.

The City of National City came in here and made the statement that we were taking the property away from a man who didn't want to sell it. Ladies and gentlemen, his Honor will tell you that the willingness or unwillingness of this fictitious or this assumed seller and buyer is not for your consideration. It doesn't make any difference. Fair market value is a meeting of the minds of a seller willing but not compelled to sell and a buyer willing but not compelled to buy. So I say, in fair and in justice, the statement that they did not want to sell it has no place in your deliberations.

Now, a peculiar situation arises here,—a peculiar situation. The City of National City comes in here and they want to capitalize—what? They want to capitalize something that they didn't get. This capitalization of income intrigues us, and I am not going to take your time in reading you figures about millions and millions and millions [1168] of dollars, because that can happen and they can take figures and prove almost anything they want to. But when the City of National City comes in here and says that they went to capitalize the income which they had received or were to receive for this property, which they on the 10th day of November, 1942 were receiving through the lease to the Tavares Construction Company, which they, out of their own mouths, said was not legal—if they capitalize that, they will find it is \$8,000, and then the only other money that they were receiving as income from this property was what they were receiving from the San Francisco Bridge Company, and the San Francisco Bridge Company was paying \$10 a month, or, \$75 a month. Ladies and gentlemen, they were receiving no income whatsoever from the balance of that land, and they had not received any income for any of it until the

government of the United States had to come in there due to the exigencies of the war and they capitalize it before they came there, before Tavares came in there. Why do they ask you to capitalize something that in the dim and distant future they say they are going to receive one cent a square foot or 10 cents a square foot for. Why do they bring that in? They don't ask you to capitalize the rental of the Tavares, added to the \$120 a year that the San Francisco Bridge Company was paying. If they asked you to do that, you have got \$8,100. Capitalize it at five per cent; capitalize it [1169] at ten per cent. At five per cent it will give you an overall value on all of that property of the City of National City of \$160,000. Capitalize it at ten per cent and it will give you a total overall value of \$81,200. Isn't that sufficient to demonstrate to you that the capitalization method can be made to do almost anything you want it to? In other words, give me the rate of capitalization you want me to use, and I will give you the figure you want.

Let's get along. The San Francisco Bridge Company came into this case, and they said, "They kicked us out." Now, that isn't testimony. The testimony is that they had a leasehold interest there, and due to the war it became necessary for, as counsel says, your government and mine to take this property, and they told them when they would want it. But, as I said to you before, fair market value contemplates a willing seller and a willing buyer. Counsel's argument with relation to the City of National City was most intriguing. Why, of course, I am being paid. That is fair, isn't it? Why, of course, I am being paid. Every lawyer in this court room is being paid. Every expert witness who went on this witness stand is being paid. Now, why? Oh, why? My



mother, when I was a child at her knee, said to me, "Son, respect your elders. Respect your elders. Respect your elders." And why should Mr. Cotton—why should Mr. Cotton be ridiculed because he got \$1,000. Now, right [1170] while we are there—right while we are there, there, ladies and gentlemen, was the only appraisal of this property made—made—made prior to the filing of this law suit. I give you, Mr. O. W. Cotton of the City of San Diego, the only man, the only witness that made his figures and his opinion of this value prior to the bringing of this law suit. He made it for the Tavares Construction Company and the Maritime Commission. He delivered it to the Tavares Construction Company. They have had it from that day to this. Never during that intervening period from September, 1942, until the time that that gentleman went on this witness stand did they ever tell him that they didn't think his figures were correct. Oh, ladies and gentlemen, some things hurt. The City of National City comes in here and says, "Why, I represent the people of the City of National City. We speak for the people of the City of National City." Well, ladies and gentlemen, I speak for the people of the City of National City, as he does, because the City of National City is a part of the United States of America. I speak for the people of the United States. And, ladies and gentlemen, in just a little while that voice of the people coming to you through me will be stilled—will be stilled—and then the burden which Bob and I have carried will pass from our shoulders to yours.

I am not going to take a great deal of time in under-[1171] taking to answer the statements that Mr. Martin made here with relation to his claim for the Tavares Construction Company. I am going to proceed

upon the theory and upon the basis that you, ladies and gentlemen of this jury, will listen to his Honor's instructions with relation to the law, and if he says to you that in arriving at your conclusion with relation to the award which you shall make to the Tavares Construction Company, you should not include therein any speculative or conjectural matters. I do not know whether I will be alive in 1950. I don't know what the situation may be. But I do know this—I do know this: that there never was and there never will be anything in that Exhibit W, which is in evidence and which you will have in your jury room that provides that the City of National City may have this property, or that the Navy Department may go on it and keep it until 1950 without it costing the City of National City something, and when I get into that, I will show you the cost.

May I tell you a story? I say that when the Tavares Construction Company undertakes to inject into this case a figure where they say that the price of this land is going to increase \$399.62 an acre—that is what they figure; maybe he didn't figure the 62 cents—and Mr. Martin said to you, ladies and gentlemen, the price of this land will increase \$399 an acre on the thirty-first day of December, 1949; that the price of this land will go up [1172] \$399. I say, "He went too far and he stayed too long."

There was a colored boy down in Oklahoma that was in the other war. He had been discharged. He came home. He met a gentleman on the street whom he had known before he went into the Army, and his friend said, "Why, hello, Rastus When did you get out of the Army?"

He says, "I just got out. I just got out of that Army, boss."

He said, "How did you like it?"

He says, "I didn't like it at all. I got court-martialed."

"You got court-martialed? What did you get court-martialed for?"

He says, "I don't know. I don't know,—something about a furlong."

He said, "It couldn't have been about a furlong. That isn't a military term. It must have been a furlough."

"No, sir. No, sir, boss. They said I went too 'fur' and I stayed too long."

"Now, Mr. Hinds of the San Francisco Bridge Company, we are now about to discuss the market value of the lands of the City of National City. Will you step up here, please, and I want to ask you two little questions, Mr. Hinds. We are concerned with what this land was before the government of the United States went in there and spent [1173] at least \$500,000 in improving it. What was it, Mr. Hinds?"

"Why, Mr. Landrum, it was nothing but mud flats."

Ladies and gentlemen, there is a man who went in there and for a company took a lease and started the improvement of parcel 7, and Mr. Hinds, when I asked him, "Mr. Hinds, what was it? Tell us now. You certainly are not interested in this law suit from that standpoint. What was it?" [1174]

"Mr. Landrum, it was mud flats." "And now, Mr. Hinds, you have a lease here." "Yes, sir. That lease, Mr. Hinds—" and I am talking about the Tavares Construction Company claim now— "That please, Mr. Hinds, carries within it a paragraph that it cannot be assigned or pledged without the written consent of the Defense Plant Corporation or of the Maritime Commis-

sion. Mr. Hindes, would you pay anything for a lease which you couldn't assign? Would you sign that lease?" "Why, no, Mr. Landrum; I wouldn't sign such a lease."

I give you that, ladies and gentlemen of the jury, on both claims, that you give to them some money for what they claim was a fee which they were to get for building a shipyard with government money upon which they could build ships at a profit and sell them to the government, and then ask you to give them \$500,000 on top of that. What was this land? What is this case all about?

The main contention of the City of National City is that they had something that no one else could get. Remember, in the beginning of the trial of this action, they had tidelands which were going into private ownership, and nowhere within the great State of California was there any such thing. Therefore, they said they were entitled to a large amount of remuneration because they had that kind of land. Do you remember that? In other words, they had a jewel of great value, a diamond in the crown. But, when George Schmultz and Charlie [1175] Shattuck and Tom Mason went on the witness stand and told you—and right here and now I want to pay to those gentlemen, and may I add I had the privilege of working with them for some time, my own compliments. I would like to stop and pin a little bouquet in the lapel of those men. You never, never, never will see five witnesses, and I will include the two gentlemen, and they are gentlemen, from the City of San Diego, my friends whom you saw, Mr. Goodwin and Mr. Cotton. To all of them I say "Cheerio and thank you." When the facts and the truth came into this lawsuit and Tom Mason went on that witness stand and told you of his knowledge and experience and told you of all of the properties that



he knew of, the Banning property—he named about nine or ten that he personally knew were in private ownership,

Then the jewel, the diamond, became paste. If that was not true, they had plenty of time to investigate and prove that it wasn't true. So the City of National City asked you to give them a lot of money. And when they asked you not to give the San Francisco Bridge Company much, "because you will have to take it out of what we get." And then they say, "Please don't give the San Francisco Bridge Company anything but give it to us because whatever you give them has got to come out of ours." And then they say as to the lease which was on Parcel 1, paying \$8,000 a year rental, that, because that was taken by Tavares and assigned to the Defense Plant [1176] Corporation, it has no value. You can't have your cake and eat it, too.

The San Francisco Bridge Company in this case is entitled to every dollar, every dollar that they are fairly and really entitled to, that they have shown by the evidence in this case that they should have. Mr. Goodwin says that, in his opinion, the San Francisco Bridge Company was entitled, and I don't want to misquote these figures because I fear that some of you may write them down and I will try to be as fair as I can in every way—Mr. Goodwin, ladies and gentlemen, the young man, and he is a fine, upstanding young man, isn't he, said that that contract, in so far as the San Francisco Bridge Company was concerned, should be \$45,750. Now, ladies and gentlemen, is this fair, am I fudging, when I say to you that that is the highest price that any one of the witnesses placed for the San Francisco Bridge Company? Mr. Cotton said \$18,800. Mr. Schmutz I do not remember but it was something like \$25,000. As counsel said,

“Your government and mine would like for you to give to the San Francisco Bridge Company the highest valuation placed by a government witness, the sum of \$45,750.” And right here, can you tell me any reason on earth why the people of the United States would want to take from those people something and not pay them for it? Why the government has paid and paid and paid and paid and paid and paid and still wants to [1177] pay, and why would Mr. Goodwin come in here, ladies and gentlemen, and undertake to be in any way unfair?

And as to the lands, the total overall valuation, Mr. Goodwin is again high. So I say to you that I believe that I am entitled to be fair. We vouched for him. We placed him before you. We stayed behind him. And his figure as to the overall value was \$310,475. \$310,475 was Mr. Goodwin’s overall valuation. From that, under the instructions which his Honor will give to you, you must set down how much you will take out for the San Francisco Bridge Company. In other words, it is what we call the unit rule. The government is taking the fee simple title to this property. You arrive at your first figure, which is \$310,000. That is the overall value, including everything, and then I apprehend that his Honor will tell you there that you will be required to take or to set out what you think, honestly and fairly and under the oath that you took, the San Francisco Bridge Company is entitled to.

Now, as to the Johnson parcel. You know, I have seen Mr. Johnson around the court room; I have seen him in the hall. He is an excellent gentleman. And the young man who represents him is a very fine, upstanding young fellow. There just isn’t any question but what Mr. Johnson was receiving rental from that property due to what

counsel has talked to you about, due to the war. Yes, they did go in [1178] and pay Mr. Johnson \$40 a month, \$480 a year, but they did it because they needed that property in order to construct what? There has been a lot of talk around this court room about building ships, building ships, building ships. Yes, ladies and gentlemen; according to Exhibit W, they were building concrete barges, ships, concrete barges, to build concrete barges. Give Mr. Johnson what you think he should have. I say to you that it is my humble opinion and, if you don't agree with me, you may use your own judgment—as a matter of fact, I am no business man—some of you are—if you capitalize that rental, you capitalize something that was taken in order that something might be gotten to the windswept hills of Bataan.

Comparative sales, ladies and gentlemen, is the only way that I can see to arrive at a just verdict for the lands in this case, and Mr. O. W. Cotton, the man who made an appraisal on that property before this lawsuit was ever brought, told you what he thought it was worth. "Mr. Cotton, come up here, sir. What do you say?" "Well, I say \$3,225, Mr. Landrum." "Yes, but Mr. Cotton, wait. I promised myself when I started in the practice of law and when I took an oath in this court that I would be fair; that I would be just as fair as I could. Mr. Cotton, you are lower than Mr. Schmutz." "Mr. Schmutz, what do you say as to the Johnson land?" "Well, Mr. Landrum, I say that Mr. Johnson should [1179] have \$3,448." That is the highest figure placed here by any government witness, \$3,448.

And, ladies and gentlemen, you saw George Schmutz. You heard him tell you that he has appraised land all the way from Hoboken, New Jersey, to Honolulu and Pearl

Harbor. You heard him tell you that he had appraised land all the way from Houston, Texas, to Grand Rapids, Michigan. You heard him state his qualifications. You heard him state his opinion of the market value of these lands alone.

I haven't been a great deal concerned with what Mr. Johnson gets out of his holdings, nor have I been a great deal concerned with what the City of National City would get, nor have I been a great deal concerned with what the San Francisco Bridge Company would get, but I want to say to you, while we are sitting here talking, that I have been concerned with the question of how much the Tavares Construction Company was going to get at your hands. Whatever else may be said, Mr. Tavares is a capable business man. He cut himself in to this wartime Garden of Eden without the expenditure of a penny. He built concrete barges for the government of the United States at a profit, and now he asks you to put your hands into the pockets of the people of the United States and to give him a half a million more.

The Court: Pardon me, Mr. Landrum. If you want to suspend at this time, we will take our recess now. [1180]

Mr. Landrum: If your Honor please, if I may be permitted, I would like to finish. Mr. Clerk, I would like to have Exhibit Q, Exhibit W and Exhibits 2, 3 and 4.

Ladies and gentlemen, there was presented in evidence in this case Exhibit Q, Exhibit W, and Exhibits 2, 3 and 4. I have not had the least doubt as to what your verdict would be in so far as the Tavares Construction Company was concerned. I propose to discuss that claim with you not from the opinion of anyone. I will discuss with you



very shortly the opinions of the gentlemen who have appeared as experts. But I say to you that the claim of the Tavares Construction Company in this goes out the window by virtue of evidence which you can see, which you can feel, and which will stand out before you like the tall pines in the forest of truth. Every claim that it has in this lawsuit stems from Exhibit W. I say to you that, in reading that document, if you can tell me what it means, then you are probably a better man than I am. I tell you that, if the lawyers can agree on what that document means, they are better lawyers than I am. So, therefore, their rights stemming from Plancor 407 are what you are to determine.

Ladies and gentlemen, it has appeared to me that in the trial of this action the other side has been doing what I say is, in the parlance of the street, straining at a gnat and swallowing a camel. We don't have to build shipyards. We [1181] don't have to depreciate this thing and dream a dream of what might happen in 1950. I will probably be dead, buried and forgotten by that time. But, if you will go with me through Exhibit W, and then can say that you believe that, in the 23rd day of December, 1944, any man would have bought that instrument, and paid its market value as they have contended for, I will be unable to follow you. What could they have gotten for it on the open market for cash on the 23rd day of December, 1944; what would a willing buyer have paid for the instrument attached there to the original, which said, "For and in consideration of the sum of \$1.00 and other valuable considerations, I hereby grant, bargain and sell unto John Jones, all my right, title and interest in and to Exhibit W"? That is the question. It is not how much it would cost to build a shipyard. It is not

how much it would sell for at its depreciated value. The fair market value of a leasehold is what that leasehold in its entirety would have sold for on the open market on the 23rd of December, 1944. In other words, what would a willing and informed buyer have paid for an assignment of that instrument.

Ladies and gentlemen, I don't want to take too much time. I know you are getting tired listening to me. You have been so kind, though, that maybe I can help you just a little.

Paragraph Nine says, "No salaries of lessee's executive officers, no fees of its attorneys, no part of the expenses [1182] incurred in conducting lessee's offices and no overhead expenses of any kind shall be included in the cost of leasing the site or of the programs, except that direct expenses of lessee's officers or employees and fees of attorneys retained or employed by lessee in connection with the programs may be so included to the extent approved by Defense Corporation."

Then, ladies and gentlemen, take with me Exhibit Q and you will find over \$200,000 in there covering what they term to be service charges. And you will remember the testimony in this lawsuit that at least the salary of Mr. Tavares for some time was paid. You will remember from the testimony that they paid for the vacations of their office force, or whoever it was. You will remember they paid \$26,000 for engineering and said they did the engineering themselves. Ladies and gentlemen, suppose that you came to me and said, "Here, Gus, I want to sell you this thing." Well I would say, "Listen, did Tavares follow the terms of that contract? Did he pay salaries? Did he pay overhead? Did he pay for the vacations of these clerks?" "Yes; he did." Well I would say, "They

might cancel that contract." I don't know. And then, in that paragraph Twelve, about which you have heard so much, and let us be very careful here, there is one word that occurs in this contract that I want to let remain forever green in your minds and memories. [1183]

On the second page of paragraph Twelve, it says, "This lease or any extension thereof under this paragraph Twelve may be terminated by the parties hereto in the manner hereinafter set forth. At any time when substantial use by lessee of the site, facilities and machinery shall be no longer required to enable lessee to construct—" not repair—"to construct boats for the government." That lease, ladies and gentlemen, could be cancelled by either of the parties when the substantial use of this property was no longer required to construct boats for the government.

Paragraph Thirteen provides that "as rental for the site, facilities and machinery (in addition to the rental for the site which lessee leased from National City, California, all of which lessee agrees to pay during the term of the lease), lessee agrees to pay to Defense Corporation \$83,327 for each boat delivered to the government under or pursuant to its contract for the construction of five concrete barges or any other contract with the government for the construction of boats; said rent to be paid as each boat is delivered to and paid for by the government."

But, after he was paid for the entire construction, he was to have the use of these facilities for the construction of boats, for the government, without rent. I am trying to be fair. After he had paid the entire amount, in other words, after he had built enough boats that the government [1184] could take the amount it had paid for the

construction of the facilities, then, when he constructed boats after that, he didn't have to pay any rent. Now, they claim that is a valuable right.

And then paragraph Fourteen says that the Defense Corporation may cancel this lease, or any extension thereof, "in the event (a) all or substantially all of lessee's contracts with the government, at any time outstanding, for the construction of concrete barges and other boats shall be terminated or cancelled prior to completion, or (b) the government shall request priority for itself or others with respect to the use of the facilities to be provided hereunder."

Now, of course, in order to be entirely fair, we don't know why either one of these parties didn't serve a notice of cancellation but we do know that the Navy Department had told Tavares before this action was brought that they were going to take it over because they asked him, "How much do you want?" And not only that but the very Exhibit W itself, in a further paragraph which I will read to you, says that it is contemplated that it will be taken over by another branch of the government. And I want to say to you that, if it was taken over by another branch of the government, it is my construction of that exhibit, which isn't Mr. Martin's, that, if it was terminated by virtue of that clause (b), if the government requested priority for another branch of [1185] the government and Tavares refused to give it, his option never came into being because he could only acquire that option by virtue of two clauses, and that isn't either one of them.

Now, I don't think there is need for us to waste a great deal of time in talking about how much he would have to pay if he exercised the option, when you and I



know what this case is about. It is simple. It is simply this: How much could you get for that paper, if you assigned it, on the open market, as it stands. All right. Then it provides that, if this notice is given, they shall have a right to negotiate and have a right to look over a man's shoulder. Ladies and gentlemen, this is a free country, a free United States. We all have a right to negotiate, and, while we do not have a right to look over someone's shoulder, yet, at the same time, I am not so sure that there ever was going to be any other man's shoulder there because the Navy Department said what they did.

Paragraph Sixteen provides, "So long as this lease remains in full force and effect—" 1950, ladies and gentlemen?"—"So long as this lease remains in full force and effect, lessee shall procure and maintain at its cost—" that is, Tavares—"insurance on the facilities."

I make this pointblank statement. I find no place in Exhibit W, not one single word, which leads me to the con-[1186] clusion that that was ever given to them as any fee for supervising the construction of a shipyard with someone else's money, with which they were to build ships. Maybe I am wrong. I want you to look for that. See if you can find in Exhibit W any statements to the effect that that is true. When you write a contract with a man, when you sign a deed with a man, it reads like this, "For and in consideration of the sum of \$1.00 and other valuable considerations." If they were to receive that for their fee for supervising the construction of a shipyard with someone else's money, with which they were to build ships, why isn't it incorporated in the paper?

Now, dwelling on this 1950 proposition, "Lessee agrees to pay to the proper authority, when and as the same be-

come due and payable, all taxes, assessments and similar charges which at any time during the term of this lease or any extension thereof may be taxed, assessed or imposed upon Defense Corporation or lessee with respect to or upon the site, the facilities, or the machinery, or any part thereof, or upon the occupier thereof, or upon the use of the site, facilities or machinery. Lessee—"Tavares—"also agrees to pay all claims or charges for or on account of water, light, heat, power, and any other service or utility furnished to or with respect to the site, the facilities or the machinery, or any part thereof." [1187]

Ladies and gentlemen, if that lease and that option was to continue in being until the 31st day of December, 1949, and Tavares was not using it, someone else was, he was not constructing concrete boats for the government, then that lease would have been a liability rather than an asset, because it would have cost him all of that money from year to year to sit there and wait there. If that is not true, counsel who follows me for the Tavares Construction Company will point out to you that isn't true. I say to you that under the terms of this agreement, if it was kept, and you speculate, you dream a dream that this land is going to increase in value at \$399.62 an acre up to 1950, then you take this agreement, you take it and tie it right into this agreement and find out by the two of them how much more it would cost Tavares to sit there and wait until 1950.

All right. Here is the thing that Mr. Hindes said was such that he never would have even signed this lease in the first place.

"Twenty-two:"—no, I beg your pardon. That is wrong. That is not the assignment clause. Mr. Hindes did not discuss this clause.—

"Twenty-two: Lessee may use such Site, Facilities and Machinery only for the construction by Lessee of boats for sale to the Government, unless otherwise permitted, in writing, by Defense Corporation with the consent [1188] of the Maritime Commission noted thereon."

"Twenty-four: Lessee will not without prior written consent of Defense Corporation and the approval of the Maritime Commission sell, assign, or pledge this lease or any of its rights or obligations hereunder, or sublease or permit the use by others of any of the property covered by this lease."

Mr. Willing Buyer, I want to sell you this lease. I want to assign it. I want to sublet a part of it to you. What will you give me?

"Why, Mr. Tavares, you can't do that without you get the consent of the Defense Plant Corporation and the Maritime Commission. I wouldn't give you five cents for it. How do you know that they are going to let you make a profit on this paper? Is it reasonable to suppose after they put up for you \$2,700,000 and build you a shipyard, that they will permit you to go ahead and sell this paper? Do you not know that on the date of this lease it is indicated that the Navy of the United States proposes to take over those utilities?"

Mr. Tavares told me that he thought that he could get the consent of the Defense Plant Corporation and the Maritime Commission for him to make another half million dollars.

Now, here, paragraph Twenty-six:

“It is contemplated that the lease of the [1189] Site, Facilities, and Machinery to be provided hereunder may be transferred and conveyed to another branch of the Government.”

I say that under your option clause, which is paragraph 15, if that should occur, and they say it is contemplated,—if that should occur and Tavares refused to give that consent, that he would not have been entitled to his option.

Now, I said that by actual real evidence I would show you by something that, as they say, you can put your teeth into that the claim of the Tavares Construction Company in this case should not be allowed. What they are actually doing, ladies and gentlemen, is coming into a condemnation case and trying to get damages against the government of the United States for what they claim is a violation of that contract.

Now, Exhibit W, which is the contract, take that and take Exhibit Q, which is the figuring, and you will find the very first item that the government paid was that they paid Tavares back all that that lease that he got from National City cost him. They paid him for it, and you will find that to be the first item set up.

Now, what is it that I have said to you would prove this case outside of the expert testimony? It is those two exhibits. You take them, tie them in with these three exhibits, and then you will bring in a verdict for nothing [1190] for the claim of the Tavares Construction Company.



The first one of these letters is dated November 21, 1944:

“With reference to our recent telephone conversation, regarding our disposition of the option given us by the Defense Plant Corporation for and in consideration of the construction”—for and in consideration of the construction—“of the facilities under Plancor 407, please be advised as follows:”

There isn't a single word in Plancor 407 that said it was for and in consideration of the construction of the facilities.

“The Tavares Construction Company, Inc., retains an option under an Agreement of Lease with the Defense Plant Corporation for the purchase or acquisition of the facilities of this shipyard on a depreciated basis. This option is in the form of compensation for having constructed approximately \$2,700,000 worth of facilities without profit, and we consider this option of some value.”

Of some value. That, ladies and gentlemen, was written before this law suit, before December 23, 1944, and all they said was: We are entitled to some consideration because we built a shipyard with your money, to build ships and sell [1191] to you, and we didn't charge you anything for supervising the building of our own shipyard. (Continuing)

“It is not the intent or desire of this company to in any way stand in the way of the acquisition of this property by the U. S. Navy.”

Now, they knew, therefore, on the 21st day of November, 1944, that the government was going to request pri-

ority for the Navy Department, and this Exhibit W says in one of those last paragraphs that it is contemplated they do that. All right. (Continuing)

“—but we are of the opinion that we are entitled to some consideration.”

Ladies and gentlemen, you are not going to give them more than they asked for, are you, before this law suit was brought? And don't forget, that that was only their asking price then.

“We will, if desired, further discuss this matter with you at your convenience.

“Very truly yours,

“CONCRETE SHIP CONSTRUCTORS

“R. S. Seabrook.”

Now, ladies and gentlemen, that was followed by a letter here of November 24, 1944:

“Eleventh Naval District

San Diego 30, California [1192]

“Attention: Capt. F. P. Conger, Industrial Manager

“Gentlemen:

“In explanation of our letter of November 21, 1944, and in compliance with Capt. F. P. Conger's request, we wish to be more specific regarding the considerations for our release.”

In other words, here is what we want now, if we turn that lease and option over to you.

“These considerations are as follows:

“1. To permit this company the free use of existing facilities to complete necessary war contracts.”

Ladies and gentlemen, they got that. If they had not, they would have come in here and told me they didn't.

"2. To permit this company the free use of facilities to carry on ship repair work for Governmental Agencies until such time as the Navy needs to convert these facilities to other purposes."

Well, you heard the way they did complete those two barges, didn't you? They got that. If they hadn't, they would have come in and told you they had those two barges—you remember they only had one more contract left—that they had two more barges to complete. And I believe I am right when I tell you that the testimony of their own words were that they had the use of this thing for the completion [1193] of these barges and didn't finish them until May 10, 1945. They got 1. They got 2. All right.

"3. To give this company a contract for the construction of the necessary Navy alterations to convert property to Navy requirements."

I don't know. I don't know whether they were offered that contract or not. But they said that if we don't get a contract to fix it up with the Navy, then you:

"Make payment to this company in the sum of 3% of the facilities constructions costs, or \$80,000, which is equivalent to a minimum construction fee for constructing the facilities.

"For your information, no fee or profit was allowed us for the facility construction, but in lieu thereof we were granted an option to purchase and the use of the facilities."

Ladies and gentlemen, on the 24th day of November, 1944, they say, "We want you to give us \$80,000 for supervising the putting in of the things you bought for us to make ships with to sell to you. We want you to give us \$80,000."

You will have these papers. If that isn't right—if what I have read to you isn't right, throw me out the window. But, my goodness, are you going to permit those people to go into the treasury of the United States, when we come in here in a condemnation case, and get any more? [1194]

Well, if you think they are entitled to that, you give it to them. But if you think that it would be right for me to say to you, "I want to get some money out of this war business. I want you to spend \$2,700,000 to build me a shipyard to build concrete ships to sell to you at a profit, and then after it is all through and done, I want you to give me \$80,000 for building my own shipyard, and supervising that, and then on top of that I have taken the expenses, I have taken the vacations for my own office force."

Now, ladies and gentlemen, we will go for just a few moments into these figures. Here is an exhibit that proves that if they did exercise their option, or if this thing would stay there and wait for them until 1950, it wouldn't be worth anything anyway. And it is right in their own letter. You don't need anybody to get up before you and figure depreciation. You don't need any expert to get up and tell you, in his opinion, that those facilities would not be depreciated very much, that they would be worth more money than that depreciated value set forth in Exhibit Q. You don't need anybody to get



up here and express to you an opinion that Tavares would not have had to pay rent had he used the facilities after December 22, 1944. You don't need anyone to tell you that the use of this shipyard for the construction of concrete ships was practically over. It is here in black and white, every one of those questions. [1195]

Now, let's see:

"Mr. Byron Howells,  
Defense Plant Corporation,  
316 Pacific Mutual Building,  
Los Angeles, California

"Dear Mr. Howells:

"In furtherance of the enclosed, and in response to your telephone call of even date, this Company has entered into Master Repair Contracts with both the U. S. Army and Navy."

Gentlemen, hadn't they received No. 2 of this one, that they were permitted, they did have contracts for the free use to carry on ship repair work.

"The billing rate, as provided for by these contracts, does not include an amount for the rental of the facilities as they are Government-owned. In accordance with the enclosed, we request permission for the use of these facilities in this connection without charge.

"In addition to this work, we are occasionally called upon to repair vessels other than Government-owned."

They were using the facilities which were purchased by the money of the people of the United States to engage

in private repair work for private individuals and asking you to come in here and give them a half a million dollars. [1196]

“for the purpose of payment to the Government for the use of these Government-owned facilities, we have, in the past, accrued an amount of 10¢ per direct man-hour worked.”

There it is. They would have had to pay 10 cents per direct man-hour worked as rental to the Defense Plant Corporation for the use of these facilities.

“To date, these accruals have amounted to \$2,806.86.”

They owed rent on this date for the use of these facilities of \$2,806.86 for using them to do work that they were paid for by private individuals.

“The determination of the 10¢ per hour to be charged was made after reviewing direct man-hours consumed in connection with the shipbuilding program.

“The yard was constructed to employ 4,000 workers. During the year 1943, 7,283,000 direct man-hours were used in connection with the construction of the concrete vessels. This year represented,”—1943 they are talking about—“more nearly than any other year, the normal expected employment for the yard if sufficient business was at hand. Facilities cost the Government approximately \$2,750,000, including interest, [1197] and this amount depreciated on a fifteen-year basis for the year of 1943 would amount to 0.025¢ per direct man-hour worked. With

this in mind 10¢ per direct man-hour appeared to be adequate compensation for the use of the facilities for other than government work.”

Now, ladies and gentlemen, there it is in plain language, that they were going to pay to the government 10 cents per direct man-hour after December 23, 1944, if they used them for anything other than for the construction of boats for the government. So if they want to wait until 1950, if they use it, they are going to pay 10 cents per man-hour, and if they don't, they are going to have to pay taxes, and everything.

“The following tabulation sets forth man-hours and depreciation per direct man-hour, by years, for the years 1942, 1943 and 1944, and the average depreciation for the three-year man-hours.

	<u>Total Direct Hrs.</u>	<u>15-Year</u>
“1942	1,534,000”	

In other words, in 1942 they were just getting started, 1,534,000.

“1943, 7,283,000,” direct man-hours. A jump from 1,534,000 to 7,283,000. In 1943 they were making full use of the facilities, building concrete barges or boats. [1198]

In 1944 (estimated), and this letter is dated December 12, 1944, so they must have meant for the balance of the year, and we haven't a record. 1944 (estimated) 2,742,000. In other words, it was all over. They only used them 2,742,000 man-hours in 1944, while they had used them 7,283,000 direct man-hours in 1943. In other words,

the work in that yard had dropped off two-thirds in 1944 according to their own written letter that you will have.

“You will note that this average amount is only 7¢ well beneath the 10¢ allowed.”

In other words, depreciation, depreciation. They talk about depreciation. Counsel got up here and talked and said that this property would be worth more money in 1950, that it would not depreciate, it would be all right. But, good. Here is their own statement as to how much it would depreciate. You add 1,534,000 and 7,283,000 and 2,742,000, and you get about 11,000,000 direct man-hours. Now, if they say, and as they do say, that that depreciation should be figured at 7 cents per man-hour—they say it right here in black and white—11,000,000 direct man-hours at 7 cents per man-hour is \$770,000 depreciation, which they themselves say. Look at it. In this exhibit it is figured about 600,000 and some odd dollars, but in their own letter it is more.

Now, ladies and gentlemen, do you need any experts? [1199] There it is, in their own language. There they pay 10 cents direct man-hour rental, and they say the depreciation is 7 cents per direct man-hour. And here:

“In view of the foregoing, we request that permission be granted to continue the practice of accruing 10¢ per direct man-hour worked for repair work other than Government or Governmental Agencies, for payment to the Government as rental of facilities.”

Ladies and gentlemen, it is my very, very, very earnest contention that if they continued this dream over



until 1950, that if they used the facilities they would have had to use them for private work, and they would had to pay 10 cents per direct man-hour as rental, and they would not have any free rent; but if they didn't use the facilities under the contract which they had they had to pay all the maintenance, the taxes, the insurance, the guards, and they are sitting there putting money out, and taking nothing in for a period of five years, and then they ask you to speculate, they ask you to bring in a verdict for them based upon conjecture.

The Court: Mr. Landrum, I think we had better take a recess. The jury has now been sitting over an hour.

Mr. Landrum: Yes, sir.

The Court: Ladies and gentlemen, we will take a recess for 10 or 15 minutes. Remember the admonition.

(A short recess was taken.) [1200]

The Court: All present. Proceed.

Mr. Muir: May I approach the bench, your Honor?

The Court: You may.

(The following proceedings took place without the hearing of the jury:)

Mr. Muir: We wish to get into the record a stipulation between the defendant National City and the defendant Leonard McLaughlin, which stipulation I will reduce to writing during the lunch hour.

The Court: Mr. McLaughlin is here, isn't he?

Mr. Muir: Yes. He is approaching the bench now, your Honor.

The Court: Mr. McLaughlin, this concerns your interest here about the lease that you had. You have no attorney and you are appearing here yourself?

Mr. McLaughlin: Yes, sir.

The Court: Very well. The City has proposed some sort of a stipulation here.

Mr. Muir: This covers the leasehold interest known as Parcel No. 8 and, out of the award of the City, there is to be allowed to Mr. McLaughlin the sum of \$40.

The Court: \$40? Is that what you are to get?

Mr. McLaughlin: Yes, sir. That is from the lessor.

The Court: Altogether?

Mr. McLaughlin: Yes, sir. [1201]

The Court: And that is all?

Mr. McLaughlin: Yes, sir.

The Court: Is that satisfactory?

Mr. McLaughlin: Yes, sir.

The Court: Very well.

Mr. Sloane: May I explain this, your Honor? I don't want to be captious on this matter of a divided verdict but I think that a fair verdict possibly would be to divide it up as to time.

The Court: Have you received a copy of this proposed instruction, Mr. Landrum, on behalf of the San Francisco Bridge Company?

Mr. Landrum: No, sir; I haven't.

The Court: The record may show that, during the argument for the plaintiff and when the argument had resumed, counsel for the San Francisco Bridge Company, for the first time, proposed an additional instruction. Without stating that the instruction will or will not be given, I want the record to show that the instruction was proffered, for the first time, at this hour. The court is of the opinion that it isn't timely perhaps but it

will be considered instruction and the decision thereon will be embodied in the instructions given to the jury. I think you should give Mr. Landrum a copy.

Mr. Sloane: I have given it to his associate. [1202]

Mr. Landrum: Could I ask one question, your Honor? I would like to know if it is your Honor's purpose to charge the jury this afternoon, in case we get through with our arguments by 3:30. In that case, I can leave tonight.

The Court: If the case is ready for submission by 3:00 o'clock. Otherwise, of course, we can, by stipulation, permit the jury to go home but it must be by general stipulation. There are no facilities here to keep the jury here at night, particularly with men and women on the jury.

Mr. Landrum: If your Honor please, if I am successful in having the other gentlemen stipulate with me, so that I may go home tonight, that will permit me to leave.

The Court: I wouldn't want the jury to go home if the court instructs them by 3:30. I would expect them to proceed with their deliberations until the dinner hour, and then, by stipulation, they could come back tomorrow morning at 9:30. Is that satisfactory?

Mr. Sloane: That is entirely satisfactory.

The Court: There are no facilities to keep juries here at night. If everybody agrees to a stipulation that the jury may go home, to their respective homes, tonight, under the admonition of the court, if they haven't reached a verdict by dinner or by such hour as the court will have concluded, they may come back tomorrow morning and resume their deliberations? Is that satisfactory? [1203]

Mr. John M. Martin: That is perfectly agreeable with me, your Honor. Do you plan to instruct them this afternoon?

The Court: I think so.

Mr. Monroe: That is agreeable, your Honor.

(The following proceedings took place within the hearing of the jury:)

The Court: All present. Proceed. Now, Mr. Landrum, you may proceed with your argument.

Mr. Landrum: Yes, your Honor.

Your Honor, and ladies and gentlemen of the jury, I now come back to resume with you, for a few more moments, this little talk we were having, in an effort to clarify for you this case. I want to say at this time that there is on file in this case a stipulation which provides that the Tavares Construction Company and its co-adventurers, on the 23rd of December, 1944, had a valid and existing option. I want to say we have also agreed that they received no fee, no private fee, for the construction of these facilities except as it might have been reflected in Exhibit W. That has been agreed to. I want to get that entirely clear.

Now, ladies and gentlemen, I have been discussing with you the real evidence, something that, as I said to you before, you can take and see and feel. I want you to do that, take these instruments, these five exhibits. And, ladies and gentlemen, it is my very, very earnest conviction that, when [1204] you have done that, you will say to the people of the United States, "We do not feel that we are going to take any of your money to give to the Tavares Construction Company."

Ladies and gentlemen, as I said to you in the beginning, this burden has been upon me. It will pass to you. You



do whatever you think is right, right and just. Be fair and be just and then I will smile with you, whatever it may be. But I said to you that this contract was shot through with speculation and conjecture. I earnestly feel that there hasn't been a single question asked on cross-examination by counsel for the Tavares Construction Company that didn't prove that fact. And I go further to say that Mr. Martin's argument proved the fact that it was shot full of speculation and conjecture from one end to the other, when he made the statement that the price of this land would increase to \$399 each day for a period of five years. That is pure speculation and conjecture.

Now, let's sell this instrument; let's go and sell this instrument. They have had Mr. Hotchkiss and these other gentlemen here presenting to you evidence going to the question of selling it. Don't forget that the willing seller is not the only one to be considered in arriving at fair market value. The buyer himself also must be taken into consideration. So that buyer would look for and say, "Well, I understand, under Exhibit W, if they do take this option, they will have to pay the cost of the land to the government. Mr. [1205] Seller, how much is the land going to cost?" "I don't know; I don't know." That depends upon the verdict that you ladies and gentlemen bring in. So I, the buyer, and the buyer is the government of the United States, say, "Well, now, first, Mr. Seller, how much are they going to have to pay for the land?" "I don't know." "Now, Mr. Seller, this contract here provides that they may request priority for some other branch of the government. Do you think that they may request priority for some other branch of the government? You are asking me to pay you money to

assign this to you. Do you think they are going to request priority for some other branch?" "I don't know." "Mr. Seller, this contract provides that it is for the purpose of building concrete ships for the government. Can I build concrete ships for the government? You are asking me to pay you money. Can I build concrete ships for the government?" "I don't know." "Mr. Seller, it appears that this shipyard was built for a specific purpose, to build concrete ships for the government. I am wondering whether or not, if I buy it, the war will last sufficiently long and the demand for concrete ships will be sufficiently great that I may use it for the purpose set forth in Exhibit W. Mr. Seller, how long is the war going to last?" "I don't know." "Mr. Seller, you tell me that I am going to get some advantages that no one else can have; that I am going to get the diamond, the jewel in the [1206] crown and, if I get it, I can borrow on it. No one else could borrow money. Mr. Seller, can I borrow some money?" "I don't know." Ladies and gentlemen, "I don't know" is the answer. It is speculative and conjectural from one end to the other unless a buyer could know how much he was going to have to pay, unless a buyer could know he was going to get a contract with the government. They had fulfilled all of their contract except for two barges they had to deliver. Unless a buyer would know how much he could sell this property for, he wouldn't pay one cent for it."

I am not going to take any more of your time. I feel I have been as honest and fair as it has been possible for me to be. I want you to know I consider it a great honor to have the long experience I have had. I entered the Department of Justice in 1909. I am proud of it. I have grown old and tired. I want to go home. But this

Tavares claim hurts me. So I have done the best I could. Now I feel that I can leave here happy and glad. I feel that whatever you do will be right and then I feel that we have all done a good job. I will be followed by some of the other gentlemen. They have been very kind to me in the trial of this case. You give to them the same fair consideration that you have given to me. Listen to them. You have been very kind. If, after my voice is stilled, they make some statements which you feel that I would have liked to have answered [1207] had I been here, you answer them for me and answer them the way you think they should be answered.

As I said to you, the voice you hear now is almost through. So do whatever you think is right. Give them every dollar to which they are entitled but not one penny more.

Ladies and gentlemen, in behalf of those who work with me and for myself, I thank you very, very much.

\* \* \* \* \*

[Closing Arguments to the Jury on Behalf of Defendants. Not printed.] [1208]

Mr. Muir: Pardon me, your Honor.

The Court: Yes.

Mr. Muir: May I present this stipulation? This is the written stipulation which covers the oral stipulation.

The Court: Yes, you may present it. It will be approved at the appropriate time.

## INSTRUCTIONS TO THE JURY

The Court: Ladies and gentlemen of the jury, you are instructed as follows: The Court will now give you instructions as to the law to be considered by you in arriving at the fair market value of the respective properties and property interests that are involved in the proceedings which have occupied your careful, patient and considerate attention for approximately the last two weeks.

The Court does not instruct you and has not intended to instruct you upon the facts of the case or upon what inferences you as jurors are to draw from the facts as you may find them from the evidence that has been presented by the litigants in this action. You are the sole and exclusive judges of the value and effect of the evidence, as well as the sole and exclusive judges of the credibility of all witnesses who have testified in the proceeding. You should weigh and consider all of the evidence without passion, prejudice or sympathy.

Your oaths require that you accept without reservation [1245] or question the law as is stated in the instructions which are now being given and which have from time to time during the progress of the trial been given to the jury upon appropriate and applicable situations as to the manner in which you should receive certain lines of evidence which were being elicited at such times. It is not inappropriate to remind you that you have no right to consider or apply any law to this proceeding that is not embodied in the Court's instructions, and no other view or opinion as to the law than such as is stated by the Court in its instructions to you is to be considered or applied by you as the law which may govern your deliberations and decisions in this action. Of the facts,



however, as before stated, you are the sole and exclusive judges.

The phrase "just compensation" has been used frequently throughout the trial and it will be repeated throughout the instructions. You are to accept the meaning and scope of such term as interpreted and stated by the Court in the instructions, and you can not set up or construct any other meaning of the term "just compensation" than that stated by the Court in the instructions.

You must confine your deliberations and base your findings and verdict in this case upon the evidence that has been presented in this case during this trial, and such inferences as you as jurors may deduce therefrom, and upon the law as given you [1246] by the Court in the instructions. All other matters, situations, sentiments or ideas must be left out of your minds and eliminated from your decision in this case. All of the litigants, without discrimination, partiality, or favoritism, are to be treated fairly and justly under the evidence and law, and when you as jurors shall have reached decision solely on such bases you will have adequately and completely performed your duties in this case.

Each juror must decide the case for himself or herself, respectively, but all jurors should deliberate and consult with one another with a view to reaching an agreement, if such can be accomplished without violence to individual judgment, upon the evidence in the case and the law as stated by the Court in the instructions, and no juror should hesitate to change his or her views or opinions when convinced by the evidence that such views or opinions are erroneous. There should be no pride of intellect which should restrain a juror from acting in

accordance with his or her conscientious judgment under the evidence in the record and the law as stated by the Court in the instructions.

This is a proceeding brought by the United States of America to condemn certain pieces of land lying and situate in the County of San Diego for use by the Government of the United States. The Government of the United States has the power known as the power of eminent domain by which it may [1247] condemn and take property for public use upon payment to the owners of such property of just compensation.

The lands involved in this proceeding are real property and lands generally known as tide and submerged lands bordering on San Diego Bay and extending to the pier-head line as established by the Federal Government. The property of defendant National City involved consists of eight parcels, description of which has been given to you and which are referred to as follows:

Parcel Number One, approximately 18.37 acres

Parcel Number Two, approximately 4.40 acres

Parcel Number Three, approximately 34.02 acres

Parcel Number Five, approximately 1.03 acres

Parcel Number Six, approximately 1.23 acres

Parcel Number Seven, approximately 6.26 acres

Parcel Number Eight, approximately 0.26 acres, and  
Area A, approximately 30.92 acres.

There is also involved in this proceeding land owned by Carl A. Johnson and wife, and known as Parcel 9, approximately 1.02 acres. As to Parcel 9 you will make a separate award from the lands of the other defendants.

The party having the burden of the proof of an issue is required to establish it by a preponderance of the evidence. The burden of proving the market value of the property taken rests respectively upon the defendants, respectively. By [1248] preponderance of the evidence is meant the greater weight of evidence, or that evidence which preponderates over or is more than or is greater than the evidence offered in contradiction thereof. The term has to do with the weight or probative value of the evidence and not necessarily with the number of witnesses testifying on behalf of either of the parties. It thus sometimes follows that the testimony of a greater number of witnesses which does not produce conviction in your minds may be overcome by the testimony of a lesser number of witnesses, or of one witness, which does produce conviction in your minds. In this connection, however, in determining the market value of the property it is for you as jurors to weigh all of the evidence and from all of the evidence introduced before you determine for yourselves the actual market value of the property at the time of taking; and it does not necessarily follow that it is necessary that any witness may have testified to the exact value in dollars and cents determined by the jury to be the actual market value. You are of course required to consider and give due weight to the testimony of all of the witnesses. But after weighing all of the testimony offered by all parties it is your province as a jury to ultimately determine for yourselves the actual market value of the property and the amount to be awarded to the defendants. [1249]

The law recognizes that in determining the fair market value of property it is not possible to make such determination with absolute accuracy in dollars and cents or

by manner of computation. The determination of the reasonable market value becomes largely a matter of opinion. Although the ordinary witness is not permitted to express his opinion but must confine his testimony to matters of fact, nevertheless, as to the matter of value, witnesses duly qualified by training and experience are entitled to testify as to their opinion. You are required to give due consideration to the opinions expressed by such expert witnesses. You are not bound to accept the opinion of the witnesses offered by either party but it is your province to pass upon the testimony of such witnesses and accord to the testimony of each witness the weight to which you deem it to be entitled. In so doing you may consider the bias or prejudice of such witness, if any has been shown, his opportunity for observing, the experience and qualifications of the witness, the reasonableness or unreasonableness of his testimony, and the facts and matters upon which he has shown his opinion to be based. It is for you to determine, therefore, the weight to be accorded to such opinions and to consider all the facts, circumstances and conditions which have been shown to affect the values of the property and from all of these things to arrive at a determination of the amount to be [1250] awarded to the defendants, respectively.

In this connection there has been introduced evidence concerning the sale price of other property in the general locality, evidence of the peculiar adaptability of the property for certain uses, and evidence of the location of the property and its location with respect to other things, its soil and its general characteristics. None of these elements should be taken by you, standing alone, as being determinative of the question you are called



upon to decide. The real question for your determination is the market value of the property at the time of the taking. All of the various elements shown by the evidence are to be considered by you insofar as it is shown that such elements affected the market value of the property. With regard to any use for which the property may have been peculiarly adapted, you are not to fix a value as though it were then being used for that purpose but you are to take that adaptability into consideration and fix the market value of the property by reason of the fact—if it be the fact—that it was peculiarly adapted to such purpose.

Further considering the matter of market value, you are instructed that in determining such value you are to take into consideration all of the physical characteristics of the property and all things which reasonably tend to increase or diminish its sale value or market value. You [1251] are to determine and award to the defendants as the market value of the land that price which they could reasonably expect to have received for the property in a sale upon the open market; and in determining that price or value you must take into consideration all purposes for which the land was suited or adapted and must consider the highest and best use to which the land might reasonably have been put. In this connection you are to take into consideration the areas of the land, its accessibility to highways, its character with regard to soil and drainage, whether it is reasonably level or otherwise, and any peculiar or particular purpose to which it might be put by reason of its character or location. You may also take into consideration the character of the property as to whether it is accessible to railroad facilities and whether its character as tidelands

fronting upon San Diego Bay make it accessible of use for wharves, docks or similar structures.

In determining the fair market value of the lands taken in this case you will not permit yourselves to be influenced by the character of the petitioner as the government of the United States, nor the character of the defendants as private individuals, counties, cities or states. You must treat this case exactly as you would a case between private parties.

You should give no consideration whatever to the [1252] willingness or unwillingness of any or all of these defendants to have the Government take this land or any interest therein, if any such there be. The sovereign Government has the absolute right to take this property for the public.

In eminent domain proceedings any increase in value by the proposed improvements planned by the Government cannot be considered. So, in determining the value of the land, you must not take into consideration what its worth would be after the Government has erected buildings or made other improvements.

The amount is not what estimate does the owner place upon the lands nor what they are worth to the taker, the United States. You should not take into account any special value that their use may have to the United States, but what is their market value, what price would they bring in the market. When the property is taken for a public use, the owner is only entitled to receive the amount of its market value. Market value does not depend in any degree upon the owner's will.

You have been cautioned that in determining the fair market value of the property you are not to award any

special value which the United States intends to make of the property but are to consider those uses to which the property is reasonably adapted. Should it develop or should you believe that the use to which the government intends to put the [1253] property happens to be the use for which it is suitable and adaptable then you may, of course, fix the market value with reference to the use to which you find it adapted. In determining this market value you are also to disregard any special value of use to the owner. You will likewise disregard any agreements between the state and the city limiting the uses. The law provides that when property is taken in a proceeding of this nature just compensation, measured by the fair market value of the property, is to be awarded. Market value is the test by which you shall determine your award. [1254]

Just compensation in this case is the fair market value of the property as of the dates as given in the instructions. It is not the value as of today. It may be worth more as of today and it may be worth less.

The question of the amount of compensation to be awarded to the respondents is not a question of what the property taken would have been worth to them if they had retained the property taken, because it may possess a greater value to them than it had on the open market. The question for you to consider is this—if the defendants had desired to sell the property taken from them by the government, what could they have obtained for it upon the market, being allowed a reasonable time in which to find a purchaser who was buying with a knowledge of all the uses and purposes to which the property was adapted?

In determining the value of the lands which in this case have been taken for public use, the same considerations are to be weighed by you as in the case of a sale of property between private persons. The inquiry in the case must be: What is the property reasonably worth in the market, viewed not merely with reference to the use to which it was put at the time this action was begun, but with reference to any and all uses to which it was reasonably and practically adapted within the reasonably near future.

In determining the fair market value of lands taken, [1255] the just compensation to the owner is that sum of money which, considering all the circumstances disclosed by the evidence, could have been obtained for the lands by an informed seller offering them in the open market for cash. It is the amount that in all reasonable probability would have been arrived at between an informed owner, willing, but not compelled to sell, and an informed purchaser, willing, but not compelled to buy. In arriving at that value, you will take into account all the considerations that would fairly be brought forward and reasonably be given weight by well informed men engaged in such bargaining.

Market value does not mean what a person would be willing to pay for certain land which he was under the necessity of buying. Neither does it mean the price at which an owner would sell at a time when he found it necessary to sell. To get the market value you must find that value that would be reached, as I have stated before, by a seller willing but not required to sell, and a buyer willing but not required to buy. These two elements, taken together, go to make up the market value; one alone does not do so.



In arriving at the fair market value of these lands you are not to fix speculative, boom or fancy values; on the other hand, you are not to fix depression or forced sale values, because the law requires you to determine the fair reasonable market salable value of the property, if the owner [1256] was offering to sell on usual terms, but not compelled to do so, and the buyer was offering to buy on usual terms, but not compelled to do so.

In your deliberations elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value.

If you find that the condemnation and taking by plaintiff United States of America of Parcel A herein was a part of the same project for which the other lands herein have been condemned and taken by the United States of America, and that it was certain on November 10, 1942, that Parcel A would be condemned and taken as a part of the same project for which the other lands herein condemned have been taken, then and in that event you must evaluate Parcel A in the same manner and use the same date of valuation as if Parcel A had been included in the original complaint for condemnation filed herein November 10, 1942.

In arriving at just compensation to be paid by plaintiff herein for the taking of the interests in land, other than the interests of the Tavares Construction Company, Inc. and its associates, you must not include within your determination of just compensation any increment in

value based upon [1257] the expenditure of funds by the government of the United States in dredging such lands or any portion of them subsequent to November 10, 1942; and if you find that any witness in arriving at his opinion of value as to interests taken herein, other than the interests of Tavares Construction Company, Inc. and its associates, has included in his opinion of value any increment resulting from the expenditure of funds by the United States of America subsequent to November 10, 1942 in dredging such lands, or any portion of them, then you are to disregard such elements in considering the weight of such opinion of value.

In relation to Parcel 9, you are instructed that the owners of this property are Carl A. Johnson and Pearl Johnson, husband and wife, as owners in fee of said land. The fee title to their land is different from that of the City of National City, in that Carl A. Johnson and Pearl Johnson, as such owners, had the right of mortgage or conveyance of their title and interest in said land, without restriction. In your determination of the fair market value in arriving at the amount of compensation to be awarded them from the property taken from them by the United States Government by condemnation, you will fix the value of your award of compensation in one sum without including therein any separate value for the building that was located on their lands at the time of the taking. The amount of your award of compensation, [1258] therefore, is to be the amount you determine as just compensation for the reasonable market value of the property of Mr. and Mrs. Johnson on November 10, 1942, which was the date of the institution of these condemnation proceedings and the date of the declaration of taking.

The property taken from the Johnsons was tangible property as distinguished from intangible property which you are concerned with in respect to the claims of all other defendants, other than the City of National City.

In arriving at your verdict for the just compensation herein as you shall determine for the fee title of Parcel 9 taken from the Johnsons, you will take into consideration each of the elements of this definition of what is the reasonable market value of property, and fix the value of their land, taking into consideration the building thereon, and make an award in one sum.

As has been stated, the only issue for you to determine in this action with respect to those parcels owned by the defendant, City of National City, is the amount to be awarded as the fair market value of the property at the time of the taking. Upon this issue the burden rests upon the defendant, City of National City, and it is therefore required to prove by a preponderance of the evidence the value of the land taken and the amount which it is entitled to receive as just compensation. In this connection you are instructed, however, [1259] that in any event it is the duty of the jury to determine the fair market value of the property, and that value must be awarded to the defendant. In other words, in a case of this character under no circumstances could you refuse to make an award to the defendant. In like manner the burden rests upon the San Francisco Bridge Company to establish by a preponderance of the evidence the fair market value of its interest and rights in the property.

The owners of property which is taken in a condemnation proceeding are entitled to recover an award of money for the taking of their property. With regard to the

eight parcels of land owned by the defendant, National City, it is not claimed that there was any detriment suffered other than by reason of the taking of the described parcels; and therefore as to these parcels the owners are to be awarded that amount which will justly compensate them for the taking of such parcels. With respect to such area the owners are entitled to recover the actual value of the land, that is to say, the market value as of the time of the taking thereof by the United States Government, to wit, on November 10, 1942. The market value is the highest price in terms of money which the land will bring is exposed for sale in the open market with a reasonable time allowed to find a purchaser, buying with knowledge of all the uses and purposes to which the land is adaptable and for which it is capable of being used. This [1260] contemplates a sale to be made in a reasonable time to a purchaser who is willing to pay what the land is fairly worth and a sale to be made by a seller not acting under any compulsion, who is willing to accept what the land is actually worth. The sum that could thus be reasonably obtained is defined in law as the market value, and is the measure of just compensation in this action.

Defendant San Francisco Bridge Company requests the Court to give the following instruction, which will now be given:

San Francisco Bridge Company is interested in this action by reason of and to the extent of its lease from the City of National City, which had seventeen years and eleven months still to run on November 10, 1942. You are called upon to fix the fair market value of the leasehold as of such date, to wit, November 10, 1942.



In arriving at your verdict in this case you should first of all arrive at a determination of the value of the lands owned by the City of National City at the time of commencement of this action in one lump sum, and arrive at a separate determination of the value of Parcel 9 owned by Mr. and Mrs. Johnson; you should then allot from the total sum which you have found to be the value of the land taken from the City of National City, exclusive of the interests of Tavares Construction Company, Inc. and its associates, that portion of your award which you find to be just compensation for the [1261] taking of the interests of the San Francisco Bridge Company; and you should allot to the City of National City that portion of your total award for the lands formerly owned by the City of National City which you find to be just compensation for the taking of the interests of said City. You are further instructed, however, that the sum of your award to the San Francisco Bridge Company, plus your award to the City of National City, must not be greater than the total award which you have determined to be just compensation for the taking of all of said interests in said lands, exclusive of the interests of Mr. and Mrs. Johnson and exclusive of the interests of the Tavares Construction Company, Inc. and its associates, for the whole cannot be greater than the sum of its parts. You are instructed further that in arriving at the value of the interests taken herein, other than the interests of Tavares Construction Company, Inc. and its associates, you must not consider any increment in such lands arising subsequent to November 10, 1942 from the expenditure of funds by the government, whether it be by dredging or the building of improvements upon said lands.

With relation to the interest of the defendant, Tavares Construction Company and its associates, such interests are to be evaluated at a later date than the interests of other defendants taken herein. The interest of the Tavares Construction Company and its associates arises out of an instrument which [1262] is in evidence as defendants' Exhibit W, an agreement entered into between Tavares Construction Company and the Defense Plant Corporation; you are to determine what is the fair market value of the interest arising out of such instrument, to wit, what is the amount for which the interest of said Tavares Construction Company and its associates under said instrument of agreement could have been sold for on the open market for cash on December 23, 1944, the date it was taken or cancelled by this proceeding or within a reasonable time thereafter; and in this connection if you find that the interest of the Tavares Construction Company and its associates under said instrument of agreement is so speculative and conjectural that no purchaser in the open market would have purchased the same except for a nominal consideration then your verdict as to the interest of the Tavares Construction Company and the Concrete Ship Constructors herein must be in a nominal figure only. You are to take into consideration the terms and conditions of the whole of said agreement and are to consider what effect, if any, a willing seller and a willing buyer would give to all of the terms and conditions of said agreement with Defense Plant Corporation in arriving at a determination as to the price for which the interest of said Tavares Construction Company and its associates under said instrument of agreement would bring at such sale.

If you find in favor of the Tavares Construction Company [1263] Inc. and against the government, you are to make your award to Tavares Construction Company, Inc. the market value, as of December 23, 1944, of the leasehold estate which Tavares Construction Company, Inc. held on the entire shipyard site, facilities and machinery from the Defense Plant Corporation.

In arriving at the amount of such award, if any you make for Tavares Construction Company, Inc., you are to take into consideration the possessory rights granted by the lease, Defendants' Exhibit W, to use the shipyard site, facilities and machinery for the period ending December 31, 1949, but subject to the right of the government to prior use thereof if requested during such period, and also subject to the right of either party to sooner terminate the lease whenever substantial use thereof would no longer be needed by the Tavares Construction Company, Inc. to construct boats for sale to the government and all other terms and conditions of said lease, Defendants' Exhibit W.

In arriving at the amount of such award, if any, for Tavares Construction Company, Inc. that you are also instructed to take into consideration the option rights of Tavares Construction Company, Inc. to purchase the entire shipyard site, facilities and machinery during the 90-day period following the expiration of the lease on December 31, 1947, or following the expiration of the extension of the lease on December 31, 1949, or following the sooner termina- [1264] tion of the lease by either party in the event the substantial use of the site, facilities and machinery should no longer be needed by Tavares Construction Company, Inc. for the construction of boats for sale to the government.

In arriving at the amount of such award, if any, for Tavares Construction Company, Inc. you are instructed that you are also to take into consideration any and all other advantages and disadvantages to the lessee contained in the provisions of said lease and all of the amendments thereto.

In arriving at the market value of the leasehold estate held by Tavares Construction Company, Inc. if any you find, on December 23, 1944, you are to view all of the factors shown and included in and by Defendants' Exhibit W in the light of the conditions as they were known on December 23, 1944, and which at that time would have been reasonably expected would occur in the future, and which a willing purchaser after a reasonable investigation would have then taken into consideration.

Evidence has been received in this case with relation to the interest of the defendant, Tavares Construction Company, Inc. That interest arises out of an instrument which is in evidence as Defendants' Exhibit W. That instrument is a lease coupled with an option. In your consideration of that feature of the case you will proceed in the same manner as you proceed as to the market value of the land, the question [1265] being what could it have been sold for on the open market for cash on December 23, 1944, the date it was taken or canceled by this proceeding, or shortly thereafter, above what Tavares Construction Company, Inc. would have to have paid under all its terms and conditions. If you find the company could have made such a sale your verdict will be for the amount you in your judgment determine the company could have gotten for it. You will consider the entire instrument, not just parts of it. If you find it could not



have been sold, then your verdict as to Tavares Construction Company, Inc. will be zero.

Ladies and gentlemen, there has been prepared, for your convenience only, a form of verdict, and I think it is self-explanatory. It states the four different subdivisions of the case, the Johnson interests, the National City interests, the San Francisco Bridge Company interests, and the Tavares Construction Company interest, and there are on the righthand margin of the form, which is prepared for your convenience only, blank spaces which, in the event that you find a verdict, will be filled in appropriately, in accordance with your unanimous agreement; that is to say, that each and every one of you must agree upon a verdict before it is recorded upon that form. But each of these interests are entitled to separate consideration, except as to the consolidated aspect of the interests of National City and of [1266] San Francisco Bridge Company, concerning which the court has already fully instructed you, and each interest is entitled to the individual consideration and finding of the jury. When you have done so, you will have the verdict signed by one of your number, whom you will appoint to act as foreman, and will then return into court with the signed verdict.

Are there any exceptions to the charge, gentlemen?

Mr. Landrum: If the court please, the government respectfully excepts to the court's failure to give plaintiff's request instruction 1 and plaintiff's requested instruction 1-A.

The Court: The exception will be noted. Any further exceptions?

Mr. Monroe: Your Honor please, the defendant, National City, excepts to the failure of the court to give its

requested instruction No. 12. That you will recall we have discussed.

Might I also add this, that we except to the charge relative to the verdict as to the San Francisco Bridge Company, in which, as I recollect, it apparently said, if I quote it right, that there was to be awarded to National City the portion of the value allocated to it, which I believe is not as written in the verdict. I think there is perhaps a thing there that might be explained to the jury.

The Court: I think the instructions sufficiently cover [1267] the matter. It might be that we could elaborate a little without in any manner affecting the instructions which have heretofore been given.

In other words, ladies and gentlemen, the award to the City of National City should be an award to that municipal corporation for the market value of the property taken, and when you have reached that figure, then you will consider the award which should be made to the San Francisco Bridge Company, and the total of the two must not exceed the value which you found to be the value of the interests of the City of National City. Does that clarify it?

Mr. Monroe: I think perhaps so. Might we also except to the portion of the charge that fixes the date of the valuation as to the Tavares parcels affecting National City? In that connection, your Honor, I simply refer to the arguments that I have heretofore presented to you, for the purpose of preserving those matters.

The Court: Yes, the record may so show.

You may swear the officers, Mr. Clerk. Or, perhaps before the officers are sworn there should be a stipulation, or perhaps we can have that when the jury retires. There are no facilities or conveniences here to keep a jury over-

night, and I am not disposed, if the jury are unable to reach an agreement before the end of a seasonable and appropriate hour for retiring to not let the jury go to their own homes [1268] and to come back tomorrow to proceed with their deliberations.

I assume you all stipulate that may be done?

Mr. Landrum: So stipulated.

Mr. John M. Martin: So stipulated.

Mr. Muir: So stipulated.

Mr. Sloane: So stipulated.

Mr. Monroe: So stipulated.

The Court: Swear the officers to take charge of the jury.

(The officers were duly sworn.)

The Court: Now, you will go with the officers, ladies and gentlemen.

You may have the exhibits, if you desire them.

Also, you may each take those two exhibits which you have had during the trial, if there is no objection.

Mr. Landrum: No objection, your Honor. I would like to know about the other exhibits also.

The Court: If they want them, they will ask for them, and we will send them all to them, if there is no objection by the other parties.

Mr. Landrum: That is agreeable.

Mr. John M. Martin: Agreeable.

Mr. Sloane: Agreeable.

Mr. Monroe: That is agreeable.

Mr. Muir: That is agreeable. [1269]

A Juror: Could we have the other exhibits?

The Court: Very well. We will send them all up to you, all of the exhibits that have been received in evidence.

(Thereupon the jury retired from the court room for its deliberations.)

The Court: Gentlemen, before you go there is one matter that I would like to discuss with you. Sometimes we are required to wait a little longer than we should if counsel should go back to their offices or have some other appointments, and if it is agreeable, I would like to have a stipulation from all of you that the verdict may be received in the absence of counsel, and that if the jury requests further instructions, and the court concludes that they should be given, that they may be given in the absence of counsel and in the presence of the reporter, who will take them down, and that you may have any exceptions that any of you may desire to any adverse rulings.

Mr. Landrum: The plaintiff will be happy to stipulate to that effect in both instances, your Honor.

Mr. John M. Martin: So stipulated, your Honor.

Mr. Monroe: So stipulated.

Mr. Muir: So stipulated.

Mr. Sloane: San Francisco Bridge so stipulates.

The Court: Perhaps you had better wait around for a while, however. [1270]



San Diego, California, Thursday, February 27, 1947.

6:10 P. M.

(Jury present.)

The Court: Mr. Foreman, Mr. Roberts, the court has received the following note, which was transmitted, I understand, by you to the bailiff: "We would like to hear the instructions re Tavares leasehold. A. E. Roberts, Foreman." You wrote that, did you?

The Foreman: Yes, sir.

The Court: File it, Mr. Clerk. If I understand the request, Mr. Roberts, of course, the charge as a whole, ladies and gentlemen, pertained not only to the Tavares interests but to all of the interests. So that the term "just compensation" and "market value" and all of those other features, credibility of witnesses and so forth, applies to Tavares as well as all of the others. But I apprehend what was meant was the three or four specific instructions that relate to that interest.

The Foreman: That is right, sir.

The Court: I will reread those. The record may show that one of the attorneys, Mr. Frank Martin, is in the court room.

"With relation to the interest of defendant Tavares Construction Company and its associates such interests are to be evaluated at a later date, than the interests of other [1271] defendants taken herein. The interest of the Tavares Construction Company and its said associates arises out of an instrument which is in evidence as Defendants' Exhibit W, an agreement entered into between Tavares Construction Company and the Defense Plant Corporation; you are to determine what is the fair market value of the interest arising out of such instru-

ment, to-wit: What is the amount for which the interest of said Tavares Construction Company and its associates under said instrument of agreement could have been sold for on the open market for cash on December 23, 1944, the date it was taken or canceled by this proceeding or within a reasonable time thereafter; and in this connection if you find that the interest of the Tavares Construction Company and its associates under said instrument of agreement is so speculative and conjectural that no purchaser in the open market would have purchased the same except for a nominal consideration, then your verdict as to the interest of the Tavares Construction Company and the Concrete Ship Constructors herein must be in a nominal figure only. You are to take into consideration the terms and conditions of the whole of said agreement and are to consider what effect, if any, a willing seller and a willing buyer would give to all of the terms and conditions of said agreement with Defense Plant Corporation in arriving at a determination as to the price for which the interest of said Tavares [1272] Construction Company and its associates under said instrument of agreement would bring at such sale.

“If you find in favor of the Tavares Construction Company, Inc., and against the government, you are to make your award to Tavares Construction Company, Inc., the market value, as of December 23, 1944, of the leasehold estate which Tavares Construction Company, Inc., held on the entire shipyard site, facilities, and machinery from the Defense Plant Corporation.

“In arriving at the amount of such award, if any you make for Tavares Construction Company, Inc., you are to take into consideration the possessory rights granted by the lease, Defendants’ Exhibit W, to use the shipyard site, facilities and machinery for the period ending December 31, 1949, but subject to the right of the government to prior use thereof if requested during such period, and also subject to the right of either party to sooner terminate the lease whenever substantial use thereof would no longer be needed by the Tavares Construction Company, Inc., to construct boats for sale to the government, and all other terms and conditions of said lease, Defendants’ Exhibit W.

“In arriving at the amount of such award, if any, for Tavares Construction Company, Inc., that you are also instructed to take into consideration the option rights of Tavares Construction Company, Inc., to purchase the entire shipyard [1273] site, facilities and machinery during the ninety-day period, following the expiration of the lease on December 31, 1947, or following the expiration of the extension of the lease on December 31, 1949, or following the sooner termination of the lease by either party in the event the substantial use of the site, facilities and machinery should no longer be needed by Tavares Construction Company, Inc., for the construction of boats for sale to the Government.

“In arriving at the amount of such award, if any, for Tavares Construction Company, Inc., you are instructed that you are also to take into consideration any and all other advantages and disadvantages to the lessee contained

in the provisions of said lease and all of the amendments thereto.

“In arriving at the market value of the leasehold estate held by Tavares Construction Company, Inc., if any you find, on December 23, 1944, you are to view all of the factors shown and included in and by Defendants’ Exhibit W in the light of the conditions as they were known on December 23, 1944, and which at that time would have been reasonably expected would occur in the future, and which a willing purchaser after a reasonable investigation would have then taken into consideration. Evidence has been received in this case with relation to the interest of the defendant Tavares Construction Company, Inc. That interest arises out of an instrument which is in evidence as Defendants’ Exhibit W. [1274] That instrument is a ‘lease coupled with an option.’ In your consideration of that feature of the case you will proceed in the same manner as you proceed as to the market value of the land, the question being what could it have been sold for on the open market for cash on December 23, 1944, the date it was taken or canceled by this proceeding, or shortly thereafter, above what Tavares Construction Company, Inc., would have to have paid under all its terms and conditions. If you find the company could have made such a sale your verdict will be for the amount you in your judgment determine the company could have gotten for it. You will consider the entire instrument, not just parts of it. If you find it could not have been sold, then your verdict as to Tavares Construction Company, Inc. will be zero.”

Those are all of the instructions, I believe, on that point. You may retire, ladies and gentlemen.

(The jury thereupon retired and a recess was taken at the hour of 6:20 o’clock p. m.) [1275]



San Diego, California, Thursday, February 27, 1947,  
6:40 P. M.

(Frank Martin, Esq., present.)

The Court: The record may show all of the jurors present and Mr. Frank Martin, representing the defendant Tavares Construction Company, in court. Ladies and gentlemen of the jury, have you agreed upon a verdict?

The Jury: We have, your Honor.

The Court: You may hand it to the bailiff, please, Mr. Foreman.

The Clerk:

“In the District Court of the United States

“In and for the Southern District of California

“Southern Division

“United States of America, Plaintiff, vs. Certain  
Parcels of Land in the City of National City, County  
of San Diego, State of California; Tavares Con-  
struction Company, et al., Defendants. No. 248-SD  
Civil.

## VERDICT

“We, the Jury in the above-entitled cause, sworn  
and impaneled to determine just compensation for  
the condemnation and taking of certain property  
herein involved, find the just compensation to be as  
follows [1276]

“Parcel 9 (known as the Johnson land)      \$6,750.00

“Parcels 1, 2, 3, 5, 6, 7, 8 and A (known  
as the City of National City Land)      \$650,000.00

“Out of which last-named sum we allocate  
to the San Francisco Bridge Company as  
just compensation for the condemnation  
and taking of its leasehold interest,      \$50,000.00

“To Tavares Construction Company, Inc., a corporation, Concrete Ship Constructors, a joint venture, Lloyd S. Stroud, R. S. Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page, Don F. Gates and Stroud-Seabrook, a co-partnership, for the condemnation and taking of all their interests under the agreement of December 27, 1941, (known as Plancor 407, as amended)

\$ 0

“Dated: San Diego, California, February 27, 1947.

A. E. Roberts,

Foreman.”

The Clerk: Ladies and gentlemen, is this your verdict? So say you one, so say you all?

The Jury: It is.

The Court: To complete the verdict, Mr. Clerk, file it and, pursuant thereto, at an appropriate time to be indicated by the court, judgment will be entered in the records of the court.

(Jury thanked by the court for its service and discharged from further consideration of this case.)

(Adjournment taken at 6:50 o'clock p. m.)

[DEFENDANTS' EXHIBIT Q]

FACILITIES AND MACHINERY

OPTION PRICE AS OF DECEMBER 23, 1944

## (Defendants' Exhibit Q)

Option Price as of December 23, 1944 of the Facilities and Machinery as Calculated by Gregory D. Smith from Assets-Property Inventory of Defense Plant Corporation Under Lease Agreement between Defense Plant Corporation and Tavares Construction Company, dated December 27, 1941, and Amendments thereto.

1. Buildings, Ways, Docks, Structures, Improvements (for paving, spur tracks, etc.,) and Building Installations other than Mechanical

Asset Property Record Schedule Page	Item	Description
1A 1100	Land, 99.89 acres being acquired through condemnation by Government.	Acquisition costs of lease and assignment; interest fee, attorney's fees and Lien report.
1B 1201	Preparation of Site	Clearing site, removing AT&S Fe Ry. Wye, SF Bridge Co. Dock Dredging
IIA 2101	Administration Building	Two-story frame, first floor 11,607 sq. ft., second floor 10,530 sq. ft., concrete foundation, ceiling 11 ft., comp. roof, exterior sheathing 1"x6" corrugated metal, celotex interior walls and ceilings, flooring, wood sash, floor design for 50 ft. x 50 ft. sq. ft. Building contains two-story concrete 15'x15'
IIA 2102	Electric Shop and Compressor Building	One-story frame building with concrete floor 10,530 sq. ft. ceiling height 10'4"; exterior sheathing 1"x6" corrugated metal and batten, comp. roof, wood sash
IIA 2103	Field Office and First Aid Building	One-story frame building, 30x117, 3,510 sq. ft. mud sill foundation; ceiling height 8 ft., flat roof, exterior sheathing, board and batten interior, walls and ceilings 4" pine flooring designed for 40# per sq. ft. wood sash.
IIA 2104	Machine Shop	One-story frame machine shop and office building 4,960 sq. ft. Machine Shop 40x100 w/82'0" height in office 9'. Ceiling height in office 9'. Exterior sheathing board and batten. Celotex interior walls in office. Concrete working side of building 69x90—5,400 sq. ft.

Buildings, Ways, etc.  
Page 1 of 8

	Depreciation Years to 12/23/44	Original Cost	Depreciation at 5% per each year or fractional part thereof	Option Price as of 12/23/44
	3	529.15	79.37	449.78
	3	8,743.72	1,311.56	7,432.16
	2	109,691.20	10,969.12	98,722.08
	3	54,737.21	8,210.58	46,526.63
	3	7,674.02	1,151.10	6,522.92
	3	10,153.50	1,523.02	8,630.48
	3	15,049.43	2,257.41	12,792.02



## (Defendants' Exhibit Q)

Asset Property Record Schedule Page	Item	Description
IIA 2105	Mill Building #1	One-story frame mill building with concrete floor. Floor area—2516 sq.ft. (40x57—13'6"x17'6") height 11'6". Exterior sheathing, board and composition roof. Wood sash.
IIA 2106	Mill Building #2	One-story frame mill building with concrete floor. Floor Area—1300 sq.ft. Ceiling height 11'. Exterior sheathing, board and batten Composition roof, wood sash.
IIA 2107	Mill Building #3	One-story frame mill building with concrete floor. Floor Area 3920 sq.ft. Ceiling height 12'. Exterior sheathing, board and batten Composition roof, wood sash.
IIA 2108	Outfitting Shop	One-story frame building 40x56 sq.ft. Concrete floor. Ceiling Height 13½'. Composition Roof, exterior sheathing board and batten, wood sash.
IIA 2109	Paint Shop	One-story frame building with concrete floor. Floor Area 1440 sq.ft. Exterior sheathing, board and batten, wood sash, composition roof, 10'4" ceiling.
IIA 2110	Steel Office	One-story building (frame) 20x55—1100 sq.ft. Exterior sheathing and batten outside Celotex walls and ceiling. 1" pine floors, wooden sash, foundation on mud sills. Ceiling height 8'. Composition roof.
IIA 2111	Timekeeping and Personnel Building	One-story frame office building, 5200 sq.ft. (30'x24'x16') with two wings 24x26), concrete block foundation. 8' ceiling, composition roof, celotex interior walls and ceilings, exterior wood sheathing, 1"3/4" siding, 4" pine floors, wood sash, floor deck 50 lb. per sq.ft., concrete vault 16'x24'.
IIA 2112	Wet Dock No. 1 Length—425' Depth—to top of caps 25' Depth to bottom of excavation—30'	North, east and south sides of dock formed by untreated 8"x12" wood sheet piling. West side of dock consists of removable reinforced concrete caisson gate. Elevation of ground surface at dock minus 18; elevation top of gate sea level minus 13. The bottom support for ship construction consists of 12x12 DF Caps, 76' long, resting on Douglas Fir untreated piles 25' to 30' in length, spaced 5'5½" center to center. Elevation of caps vary from minus 12 to minus 13. Water is maintained inside of wet dock by well points consisting of 8" headers & 1½" well points. Continuous pumping required. Ship launching by derrick.

Buildings, Ways, etc.  
Page 2 of 8

Depreciation Years to 12/23/44	Original Cost	Depreciation at 5% per each year or fractional part thereof	Option Price as of 12/23/44
3	4,253.46	638.02	3,615.44
3	1,925.61	288.84	1,636.77
3	8,360.42	1,254.06	7,106.36
2	3,360.00	336.00	3,024.00
2	2,462.41	246.24	2,216.17
3	2,336.78	350.52	1,986.26
3	12,905.53	1,935.83	10,969.70
3	174,283.89	26,142.58	148,141.31

## (Defendants' Exhibit Q)

Asset Property  
Record  
Schedule Page

Item

Description

IIA	2113	Wet Dock No. 2 Length—425'; Width 76' Depth to top of caps 25' Depth to bottom of excavation—30'	North, east and south sides of dock formed untreated 8"x12" wooden sheet piling. W of dock formed by removable reinforced caisson gate. Elevation of ground surface of wooden sheet piling minus 12; elevation surface inside of dock minus 18; elevation gate seat minus 13. The bottom support construction consists of 12x12 DF Caps, resting on Douglas Fir Untreated Piles 25' length driven to twenty ton bearing. The piles are spaced 5'5½" center to center. E of top of caps vary from minus 12 to m Water level maintained inside of wet dock points, consisting of 8" headers and 1½" points. Continuous pumping required. Ship by flooding dock.
IIA	2114	Wet Dock No. 3 Length 425' Width 76' Depth at top of caps 25.75' Depth to bottom of excavation—30'	North, east and south sides of dock formed steel sheet piling. West end of dock cor removable reinforced concrete caisson gate. Elevation of ground surface at top of steel sheet piling plus 12; elevation of ground surface inside dock minus 18.75'. Elevation top of gate minus 13.75'. The bottom support for sheet piling construction consists of pile caps, 76' in length built up from 5-3x12 planks bolted together, resting on DF untreated piles 25' to 30' in length, driven to 20 ton bearing. Elevation at top of pile caps from minus 13.75 to minus 12.75. The piles are spaced 5'5½" center to center. Water level maintained inside of wet dock by well consisting of 8" headers and 1½" well points. Continuous pumping required. Ships launch flooding dock.
IIA	2115	Wet Dock No. 4 Length 425' Width 76' Depth at top of caps 25.75'. Depth to bottom of excavation 30'	North, east and south sides of dock formed steel sheet piling. West end of dock cor removable reinforced caisson gates. Elevation of ground surface at top of steel sheet piling plus 12; elevation of ground surface inside dock minus 18.75'. Elevation top of gate seat minus 13.75'. The bottom support for ship construction consists of pile caps 76' in length built up from 5-3x12 planks bolted together, resting on Douglas Fir Untreated Piles 25' to 30' in length, driven to 20 ton bearing. Elevation at top of pile caps varies from minus 13.75 to minus 12.75. The rows of piles are spaced 5'5½" center to center. Water level maintained inside of wet dock by well points consisting of 8" headers and 1½" well points. Continuous pumping required. Ships launched by flooding dock.

Buildings, Ways, etc.  
Page 3 of 8

	Depreciation Years to 12/23/44	Original Cost	Depreciation at 5% per each year or fractional part thereof	Option Price as of 12/23/44
	3	174,283.90	26,142.58	148,141.32
	3	256,476.01	38,471.40	218,004.61
	2	256,476.03	25,647.60	230,828.43



## (Defendants' Exhibit Q)

Asset Property  
Record  
Schedule Page

Item

Description

IIA	2116	Outfitting Pier 50' wide x 430' long, extending west from U. S. Bulkhead line.	Pier consists of 12" reinforced concrete de- ported by 43 bents at 10' centers. Th 430—40 to 42' support piles under bents. are 40—54' treated batter piles. The outside fenders are supported by 88—40' creosoted
IIA	2117	Warehouse No. 1	One-story frame warehouse (54x75'6"0—429' Outside platform W/2" decking (40x54) 21 Concrete floor area—2160 sq.ft. Dirt floor 1360 sq.ft. Wood floor area—780 sq.ft. height—11' and 13'6". Composition roof, sheathing, board and batten.
IIA	2118	Navy Warehouse	One-story frame building with shed roof, 40x addition 20x30—3000 sq.ft. concrete floor, height 13', composition roof, exterior sh board and batten, wood sash.
IIA	2119	Warehouse No. 3	One-story frame warehouse. Main building 20,160 sq.ft. Office 28x46—1288 sq.ft. F 43x45 and 30x10' 2,295 sq.ft.
		Main Warehouse	Concrete floor, 20,160 sq.ft. 9,940 sq.ft. of t warehouse has a mezzanine floor to incre storage area.
		Warehouse Office	28x48' 1344 sq.ft. This constructed on top of elevated warehouse platform. Ceiling heig Composition roof, exterior sheathing, bo batten celotex walls and ceiling, 4" pin wood sash. This addition contains two rooms.
			Elevated platforms (wood) w/2" plankin wooden mud sills—43x45' and 36x10', 2,295
IIA	2120	Warehouse No. 4	One-story frame warehouse 30x50', 1500 sq.f ing height 11'6" Foundation 5—4x10 m Composition roof, exterior sheathing, bo batten 2x12 pine floors, wood sash.
IIA	2121	Mold Loft No. 1	4" Concrete foundation with 2x5 sleepers tongue and groove pine floor 64x220—14,3
		Mold Loft No. 2	4" Concrete foundation with 2x4 sleepers tongue and groove pine floor 50x85x2, 8,500

Buildings, Ways, etc.  
Page 4 of 8

	Depreciation Years to 12/23/44	Original Cost	Depreciation at 5% per each year or fractional part thereof	Option Price as of 12/23/44
2	3	114,317.04	17,147.56	97,169.48
2	3	5,560.00	834.00	4,726.00
2	3	3,607.93	541.19	3,066.74
2	3	22,022.93	3,303.44	18,719.49
3	2	2,250.00	225.00	2,025.00

## (Defendants' Exhibit Q)

Asset Property  
Record  
Schedule Page

Item

Description

Mold Loft No. 2-A

4" concrete foundation with 2x4 sleepers  
tongue and groove pine floor 65x95x2, 12,3

Mold Loft No. 3

4" concrete foundation with 2x4 sleepers  
tongue and groove pine floor 65x220, 14,3  
Total square feet 49,480.IIA 2122 Yard Toilets and Wash  
Rooms

For details of construction see following table

Bldg. No.	#17	#23	#41	#47
Sq. Ft.	220	264	396	396
Floor	Wood	Concrete	Concrete	Concrete
Ceiling				
Height	8'6"	8'6"	8'6"	8'6"
Sheathing	B&B	B&B	B&B	B&B
Sash	Wood	Wood	Wood	Wood

IIA 2123 Miscellaneous Small  
BuildingsTemporary Frame Buildings on Temporary  
tations 8,299 sq.ft.IIA 2124 Miscellaneous Work Per-  
formed on Buildings  
on that portion of the  
Original site which  
was abandoned for  
use by the Navy.Machine Shop—Mill Buildings—Wash Rooms  
houses—Timekeeping Building—Engineering  
Mold Lofts—Administration Building.IIB 2201 Heating and Plumbing  
Fixtures in Buildings

IIB 2202 Lighting Fixtures

IIB 2203 Miscellaneous Building  
Installations (Non-  
mechanical)

4 Exhaust Fans—Fire Gong.

IIC 2301 Special Gantry Track  
for Handling SkeggsApproximately 300 lineal feet of 30 lb. rail o  
ard timber railroad ties. Spaced 16" on cIIC 2302 West Bulkhead  
A 380' Section of  
Bulkhead north of  
Dock No. 1, consist-  
ing of 30' 14" steel H.  
Piles (#89 per foot),  
on 10' centers with  
precast concrete slabs  
between piling extend-  
ing to a depth of 19'  
below the top of the  
piles.Top of piles driven to elevation plus 12. 1  
rap placed in front of piles on slope of 1:  
from elevation minus 2 to elevation minus  
tween Docks 1 & 2 and 60' North of Dock  
bulkhead consists of steel sheet piling d  
elevation of top of piling plus 12. From 6  
of Dock 3 to 40' south of Dock 2 ther  
bulkhead protection.IIC 2303 Roads & Gravel Surfac-  
ingInside the yard there are approximately 7,00  
feet of graded, unpaved roads.

Buildings, Ways, etc.  
Page 5 of 8

te al e	Depreciation Years to 12/23/44	Original Cost	Depreciation at 5% per each year or fractional part thereof	Option Price as of 12/23/44
2	3	17,748.26	2,662.24	15,086.02
2	3	3,977.82	596.67	3,381.15
2-3	2½	14,537.38	1,817.17	12,720.21
2	3	17,298.81	2,594.82	14,703.99
2	3	6,874.61	1,031.19	5,843.42
2	3	6,906.86	1,036.03	5,870.83
2	3	103.08	15.46	87.62
3	2	3,865.17	386.52	3,478.65
2	3	62,094.15	9,314.12	52,780.03
2	3	9,474.08	1,421.11	8,052.97



## (Defendants' Exhibit Q)

Asset Property  
Record  
Schedule Page

Item

Description

IIC	2304	Yard Grading and Paving—Steel Yard	Yard Grading includes leveling and preparing site. Oil Paving done in steel yard.
IIC	2305	South Bulkhead Location: 450' West- erly from Dock No. 4	This bulkhead is constructed along U. S. F Line, consisting of 40' ZP32 Steel sheet piling driven to elevation minus 28. The bulkhead with 2— $\frac{3}{8}$ " tie rods, 50' long on 7' centers inforced concrete beams 24"x36" cast between piling at 15" centers.
IIC	2306	Railway Spur Tracks (On Leasehold)	There are 5 Spur Tracks—Rails 110# Rails #8 Switches.
IIC	2307	Boundary Fence	4,145' of #9 Gauge 2" mesh fencing. 3 Str barbs wire around top of fence. All material galvanized, 1,480 ft. of fence on northline between wooden posts, balance steel posts. 3 sets of gates included in the above length.
IIC	2308	Sewage Pump Lift Includes Pumps, Motors, Switches	Reinforced concrete Sump 6' in diameter, 24' deep.
IIC	2309	Sewer Mains	350' of 4" Concrete Sewer Pipe 3686' of 6" " " " "
IIC	2310	Telephone Lines (On Leasehold)	All yard telephone lines are placed in underground conduits, 6,720' of $\frac{3}{4}$ " to 2". The telephone equipment are the property of the California Telephone Company.
IIC	2311	Gantry Track #1 This Gantry is located midway between Docks 1 and 2. Length 790'.	The Gantry for this track is supported on 14' apart. On the westerly 415' of the track the rails are supported on 14x14 DF stringing on top of 14x14 DF Caps, 5' long, supported by 2 untreated DF piles 30' long, distance between bents 15'. On the remainder of the track the rail is supported on ties with timbers at 30' centers.

Buildings, Ways, etc.  
Page 6 of 8

	Depreciation Years to 12/23/44	Original Cost	Depreciation at 5% per each year or fractional part thereof	Option Price as of 12/23/44
2	3	25,267.38	3,790.11	21,477.27
3	2	56,939.23	5,693.92	51,245.31
2-3	2½	20,822.52	2,602.82	18,219.70
2-3	2½	6,837.42	854.68	5,982.74
2	3	1,991.32	298.70	1,692.62
2	3	11,672.62	1,750.89	9,921.73
2	3	3,322.01	498.30	2,823.71
2	3	19,450.81	2,917.62	16,533.19

## (Defendants' Exhibit Q)

Asset Property  
Record  
Schedule Page

Item

Description

IIC	2312	Gantry Track #2 Length 740' Gantry No. 2 is located 67' south of the center line of Dock No. 2.	The tracks on this Gantry are carried on 110# rails. The distance between center trucks is 20'7". Each set of rails is sup- ported on 8"x12"x8" ties on 20" centers with cross ties at 30'. The track is supported by ballast to a depth of 1'9" below the top of Total length of track 780'.																																																																																
IIC	2313	Gantry Track #3 Length 870'. The cen- ter line of Gantry No. 3 is 28' south of Dock No. 3	The track gauge for this Gantry is 32'. Ea- ch rail is supported on a reinforced concrete 32" wide by 24" deep. The stringer in tur- ported on 35' DF untreated piles driven on a batter of 1 to 6 at 3'4" centers throug- entire length of the track.																																																																																
IIC	2314	Gantry Track #4 Total length of this Gantry as originally constructed is 875'. The center line of Gantry No. 4 is lo- cated 28' south of Dock No. 4.	The westerly 410' is supported on reinforced stringers 32" wide by 24" deep. The strin- ger is supported on 35' DF untreated pile alternately on a batter of 1 to 6 at 3'4". The track is cross tied at 30' centers. The 465' of track is supported on 8"x12"x8" tie centers. The road bed is ballasted wit- h gravel below the top of the ties.  This track has been extended easterly 228'. In this extension the 110# rails are supported on 8"x12"x8" ties on 20' centers with 18" of gravel ballast below the top of ties. The track is cross tied at 30'																																																																																
IIC	2315	Water & Air Lines (On Leasehold)	<table><tr><th colspan="4">Steel Water Lines</th><th colspan="4">Compressed Air Lines</th></tr><tr><td>1270'</td><td>10"</td><td>Steel Pipe</td><td></td><td>2050'</td><td>4"</td><td>Steel Pipe</td><td></td></tr><tr><td>750'</td><td>8"</td><td>"</td><td>"</td><td>1010'</td><td>3"</td><td>"</td><td>"</td></tr><tr><td>6550'</td><td>6"</td><td>"</td><td>"</td><td>6380'</td><td>2"</td><td>"</td><td>"</td></tr><tr><td>2030'</td><td>4"</td><td>"</td><td>"</td><td>2250'</td><td>1"</td><td>"</td><td>"</td></tr><tr><td>490'</td><td>3"</td><td>"</td><td>"</td><td></td><td></td><td></td><td></td></tr><tr><td>250'</td><td>2½"</td><td>"</td><td>"</td><td></td><td></td><td></td><td></td></tr><tr><td>1420'</td><td>2"</td><td>"</td><td>"</td><td></td><td></td><td></td><td></td></tr><tr><td>410'</td><td>1"</td><td>"</td><td>"</td><td></td><td></td><td></td><td></td></tr><tr><td>400'</td><td>¾"</td><td>"</td><td>"</td><td></td><td></td><td></td><td></td></tr></table>	Steel Water Lines				Compressed Air Lines				1270'	10"	Steel Pipe		2050'	4"	Steel Pipe		750'	8"	"	"	1010'	3"	"	"	6550'	6"	"	"	6380'	2"	"	"	2030'	4"	"	"	2250'	1"	"	"	490'	3"	"	"					250'	2½"	"	"					1420'	2"	"	"					410'	1"	"	"					400'	¾"	"	"				
Steel Water Lines				Compressed Air Lines																																																																															
1270'	10"	Steel Pipe		2050'	4"	Steel Pipe																																																																													
750'	8"	"	"	1010'	3"	"	"																																																																												
6550'	6"	"	"	6380'	2"	"	"																																																																												
2030'	4"	"	"	2250'	1"	"	"																																																																												
490'	3"	"	"																																																																																
250'	2½"	"	"																																																																																
1420'	2"	"	"																																																																																
410'	1"	"	"																																																																																
400'	¾"	"	"																																																																																

Buildings, Ways, etc.  
Page 7 of 8

	Depreciation Years to 12/23/44	Original Cost	Depreciation at 5% per each year or fractional part thereof	Option Price as of 12/23/44
3	2	11,100.00	1,110.00	9,990.00
2	3	47,850.00	7,177.50	40,672.50
3	2	29,378.07	2,937.81	26,440.26
2	3	33,750.52	5,062.58	28,687.94



## (Defendants' Exhibit Q)

Asset Property  
Record

Schedule	Page	Item	Description
IIC	2316	Floodlighting System	System for plant protection and night work consisting of 153 lights mounted on wood at various locations in the yard.
IIC	2317	Electrical Power & Light Lines	This includes power and light lines, all of v laid in underground conduit. Power is p from the San Diego Consolidated Gas & Company, delivered to the main substation site at 2300 V., 60 cycle, A.C. Distributi 440, 220 and 110 volts.
IIC	2318	Substations 9 Power Substations 2 Lighting Substations	Concrete floor, steel frame supports for ec wood or steel fence.
11C-1	2401	Exterior Fence (Outside of Leasehold)	300' of 72" #9 gauge 2" mesh fencing 1—se gates at railroad entrance on east side of
11C-1	2402	Railway Spur Tracks (Off Leasehold)	Rails 110# relay—2 #8 switches.
11C-1	2403	Telephone Lines (Off Leasehold)	The telephone cable in this conduit is the pro the Southern California Telephone Compar
11C-1	2404	Sewer Mains (Off Leasehold)	50' of 6" Concrete Steel Sewer Main. 200' of 6" Steel Concrete Sewer Main.
11C-1	2405	Waterline (Off Leasehold)	820'— 6" Steel Pipe 1050'—10" " "
11C-1	2406	Abandoned Work	The following items of Construction were pe on that portion of the original site which v abandoned for use by the Navy. Preparation of Site Roadways and Area Paving Utilities

## SUB-TOTALS

2501-2 Pro-rata of Service Costs (For basis see notes on Summary Sheet)

## TOTALS

Buildings, Ways, etc.  
Page 8 of 8

e al e	Depreciation Years to 12/23/44	Original Cost	Depreciation at 5% per each year or fractional part thereof	Option Price as of 12/23/44
2	3	3,181.40	477.21	2,704.19
2	3	79,075.31	11,861.30	67,214.01
2	3	34,107.73	5,116.16	28,991.57
2	3	500.00	75.00	425.00
2	3	2,906.54	435.98	2,470.56
2	3	156.00	23.40	132.60
2	3	1,196.00	179.40	1,016.60
2	3	4,360.00	654.00	3,706.00
2	3	37,501.98	5,625.30	31,876.68
		<u>\$1,825,707.25</u>	<u>\$249,025.03</u> (13.64%)	<u>\$1,576,682.22</u>
		174,089.50	23,745.80	150,343.70
		<u>\$1,999,796.75</u>	<u>\$272,770.83</u>	<u>\$1,727,025.92</u>

## (Defendants' Exhibit Q)

Option Price as of December 23, 1944 of the Facilities and Mac as Calculated by Gregory D. Smith from Assets-Property I of Defense Plant Corporation Under Lease Agreement b Defense Plant Corporation and Tavares Construction Co. dated December 27, 1941, and Amendments thereto.

2. Installations (mechanical), Movable Equipment, Cranes, Machinery, Shop Fixtures, Laboratory and Test Equip Furniture and Fixtures, Loading and Lifting Trucks, etc

Asset Property  
Record  
Schedule Page

Item

Description

III-A	3101/5	Miscellaneous	Clock, Couches, Fire Extinguishers
	3106	2 Koehring Paving Type Concrete Mixers	Model 27-E, Serials 18470 & 18477 (used)
III-A-1	3201/14	Miscellaneous Machine Tools	Lathes, Benders, Drills, Thread, Mach. etc.
III-A-2	3201/2	Miscellaneous Equip-ment	Punch & Shears
	3303	" "	Steam Hammer
III-A-3	3401	1 Batching Plant	Used for batching of aggregates for concrete ship construction, 55 CU YD Capacity
	3402	1 American Revolver Gantry Crane	Model #675 Serial No. 127, Electrically main hoist 3 drum, with 150 H.P., 3 pha Motor, 105' boom. Swinger—Single drum H.P. D.C. Motor (DPC #A-1)
		1 American Revolver Gantry Crane	Model #10125 Serial No. 202, Electrically 125' boom with following equip: 1—200 H.P., 440 V. 60 cycle motor 1—125 H.P., 440 V. 60 Cycle motor 1— 50 H.P., 440 V. 60 cycle motor 2— 15 H.P., 440 V. 60 cycle motor 3—2300/440 V Transformers (DPC #A-19)
	3403	2 Washington Gantry Cranes	Serial #7837 and #7844, 43 ton capacity, 11 10' jib including following equipment: 2—150 H.P. 440V, 3 phase, 60 cycle motor 3— 30 H.P. 440V, 3 phase, 60 cycle motor 8— 15 H.P. 440V, 3 phase, 60 cycle motor 2—Ingersoll-Rand 1½ H.P. Compressors 2—Transformers Miscellaneous switch gear & controls
	3404	1 Lorain Crane	Model 40-A Serial #10326 W/35' Boom, inte section, Clam equipment and boom splice, starter
		1 Williams-Clamshell Bucket	Model 1717 W/Standard weights and teeth #7230

Installations (mechanical), etc.  
Page 1 of 3 Pages

te ial e	Depreciation Years to 12-23-44	Original Cost	Depreciation at 10% per each year or fractional part thereof	Option Price as of 12/23/44
2	3	290.88	87.26	203.62
2	3	14,790.36	4,437.11	10,353.25
2	3	14,440.79	4,332.24	10,108.55
3	2	6,908.19	1,381.64	5,526.55
2	3	1,812.62	543.79	1,268.83
3	2	638.00	127.60	510.40
2	3	61,502.31	18,450.69	43,051.62
2	3	33,873.91	10,162.17	23,711.74
3	2	60,351.10	12,070.22	48,280.88
2	3	141,321.02	42,396.31	98,924.71
2	3	7,528.47	2,258.54	5,269.93



## (Defendants' Exhibit Q)

3408 1 Model 501 Koehring  
Combination Shovel  
and Dragline

Serial #1029 equipped with a 6 cylinder D  
consin Gasoline Engine (Serial #1510  
shovel boom with 16' dipper sticks, 1¼ C.  
per (attachment #697). 44' McCaffery  
Crane Boom with 1-5' Used

Asset Property  
Record  
Schedule Page

Item

Description

II-A-3 3427 1 Flash Welder

F-4 150 KVA, 440 Volt, 60 Cycle, Automa  
Operated, air verticle clamps, automatic  
foot switch control, complete with one  
copper dies

3443 1 Lumber Carrier

Model 90-12068 Ross Carrier #1796 equippo  
Wheel hydraulic brakes. Goodyear 12-2  
Hercules WXLC-3 Motor #182242 and all  
ard Equipment

3444 1 Lumber Carrier

Model 90-7968-N Rose Carrier Serial #1867  
4/4 wheet hydraulic brakes. Firestone 1  
tires Hercula WXCL-3 Motor #188053  
other Standard Equipment

3405/7 Construction Equipment

3409/26

3428/41

3445/56

" "  
" "  
" "

Concrete towers, chutes, carts, electric ba  
swing saws, woodworking machines, fire  
guishers, hose carts, hose reels, etc.

II-B 3501 1 Gardner Denver Air  
Compressor

7½x5¾x5 Class WE—Two stage with mo  
drive

1 Ingersoll-Rand Air  
Compressor

888 Cu. Ft. capacity, Two stage with motor

3502/8 Miscellaneous

Air Hoists, Chain Hoists, Chain Pullers, etc

3509 2 Reconditioned 8" Well  
Point Pump Electric  
Drive Vacuum

1750'—8" Header Pipe 1½" outlets 3' or 4' on  
400—1½" self jetting well points  
400—Swing Joint Assemblies  
380—1½"x20' Blk Pipe thread both ends  
coupling  
12—8" Ells for Header Pipe  
6—Screw Gates Valves 8"  
5—8" Ties  
200—8" Spiral Weld Pipe W/couplings

3510 1 Wintroath Vertical  
Turbine Pump #3026

Consisting of a High Vacuum, selfpriming. C  
1700 G-PM, complete with vacuum chambe  
Vacuum pump #30 HP direct drive,  
motor

3511 1 Byron Jackson 6"  
Electric Centrifugal  
Pump

DPC 915 Serial #92685 Motor DPC 916, GE  
#520474, type 16-16A-1200, W/GE Electric  
trols and float switch W/7' of 6" Suctio  
and foot valve

3 5,180.00 1,554.00 3,626.00

Installations (mechanical), etc.

Page 2 of 3 Pages

te ial e	Depreciation Years to 12-23-44	Original Cost	Depreciation at 10% per each year or fractional part thereof	Option Price as of 12/23/44
2	3	7,415.27	2,224.58	5,190.69
2	3	7,485.00	2,245.50	5,239.50
3	2	6,592.10	1,318.42	5,273.68
2	3	41,201.42	12,360.43	28,840.99
3	2	11,348.56	2,269.71	9,078.85
4	1	3,879.56	387.96	3,491.60
2	3	6,852.49	2,055.75	4,796.74
2	3	14,117.05	4,235.11	9,881.94
3	2	1,006.69	201.34	805.35
2	3	14,269.40	4,280.82	9,968.58
2	3	1,965.23	589.57	1,375.66
2	3	187.50	56.25	131.25

## (Defendants' Exhibit Q)

3512	1 Used 3" Split Case Byron Jackson Pump	Direct connected to A-15 HP-440 V-60 RPM 3 PH. Ball Bearing, U. S. Motor
3513	1 Wintroath Pump — Serial #3-73	1 Head Type SH-6-A, W/ General Electric Motor W/18" OD Nipple, thread on and OD Column, 3" Tubing, 1-15/16" Shafting #20-2500 Bowls, I stage—16" OD Strainer type 24"x12"
3514	1 Deep Well Pump & Line Starter	#3500 GPM at 50' Head equipped W/60 HP 3PH-60 Cyc-Electric Motor and Westinghouse 11-200 Cross Line Starter
3515	2 Thor Sump Pumps	#361-T
3516	1 Ingersoll Rand Sump Pump	#10351

Asset Property  
Record

Schedule	Page	Item	Description
III-B	3517	4—#4 Byron Jackson Sump Pumps	
	3518	1—Electric Sump Pump	Imperial #BA-2—60 cyc.
	3519	1—Kimball Krough Ver- tical Pump	4"—New DPC-698—US 1½ HP Motor #261663 220/440V W/5'4" Suction Pipe
	3520	4—Sterling 1½" Sta- tionary Gasoline Water Pumps	Pump Model 3M Engine Model RSC 2646 Serial #10302, #105340, #17434, and #14
	3521/27	Miscellaneous	Round Winches, Trolleys, Winding Engine,
III-D	3601	Office Furniture	Desks, Tables, Chairs, etc.
	to 3708	Office Equipment	Typewriters, Calculators, Adding Machines,
		Office Supplies	Trays, Baskets, etc.

## SUB-TOTALS

2501-2 Pro-rata of Service Costs (For basis see notes on Summary Sheet)

## TOTALS

2	3	239.10	71.73	167.37
2	3	2,060.29	618.09	1,442.20
2	3	1,848.46	554.54	1,293.92
2	3	300.00	90.00	210.00
2	3	284.05	85.21	198.84

Installations (mechanical), etc.  
Page 3 of 3 Pages

	Depreciation Years to 12-23-44	Original Cost	Depreciation at 10% per each year or fractional part thereof	Option Price as of 12/23/44
2	3	1,135.66	340.70	794.96
2	3	35.89	10.77	25.12
2	3	266.80	80.04	186.76
2	3	222.29	66.69	155.60
2	3	3,416.11	1,024.83	2,391.28
2	3	18,996.55	5,698.96	13,297.59
3	2	20,879.45	4,175.89	16,703.56
2	3	32,492.39	9,747.72	22,744.67
3	2	2,994.31	598.86	2,395.45
2	3	398.47	119.54	278.93
		<u>\$550,527.74</u>	<u>\$153,310.58</u>	<u>\$397,217.16</u>
		52,495.30	(27.85%) 14,619.94	37,875.36
		<u>\$603,023.04</u>	<u>\$167,930.52</u>	<u>\$435,092.52</u>



## (Defendants' Exhibit Q)

Option Price as of December 23, 1944 of the Facilities and Mac  
as Calculated by Gregory D. Smith from Assets-Property I  
of Defense Plant Corporation Under Lease Agreement be  
Defense Plant Corporation and Tavares Construction Co.  
dated December 27, 1941, and Amendments thereto.

## 3. Portable Durable Tools and Automotive Equipment

Asset Property  
Record  
Schedule Page

Item

Description

IV-A	4103-4225	Portable Durable Tools	Concrete Vibrators, Pneumatic and Electric saws, welding machines and torches, etc.
IV-B	4301	Automotive Equipment	5 Bicycles, Dayton, Balloon Tires
	4302		2 Economy Model Auto Glides #97984, 9803 2 Glides W/pass. Side Cars #97887 #97892
	4303		1—8 cylinder 90 HP Ford Super Deluxe Sedan Four 600x16—4 ply tires & seat Motor No. 18-6790526
	4304		1—Ford 6 Deluxe Tudor Sedan Motor #1-0
	4305		1—New 1942 Ford 6 Deluxe Tudor Sedan #1 GA-50962
	4306		1—New 1942—8 cylinder Ford Pick-up Flor- FY-196 Motor #1 GC-66082
	4307		1—8 cylinder 1942 Ford Pick-up Motor #1 0
	4308		1—158"—90 HP Stake Truck equipped w/ ply tires (duals in rear) overload spring forced frame & special cooling Ford
	4309		1—1½ Ton Flat Rack Ford Truck—158" HP equipped W/32x6-10 ply tires (duals overload springs, reinforced frame & spec ing system W/area signal & road lights #99-T-472742
	4310		1—New 1942 Ford 1½ ton truck cab & ch HP 8 cylinder 158" platform equipped Ton ply tires all around duals in the rear load springs—reinforced frame—long arm signal arm & clearance lights and standar ment, Motor #BB-18-6797158

Portable Durable Tools  
& Automotive Equipment  
Page 1 of 2 Pages

	Depreciation Years to 12/23/44	Original Cost	Depreciation at 25% per each year or fractional part thereof	Option Price as of 12/23/44
2	3	67,227.88	50,420.91	16,806.97
3	2	2,708.95	1,354.47	1,354.48
3	2	205.74	102.87	102.87
2	3	831.80	623.85	207.95
2	3	1,222.22	916.67	305.55
2	3	1,184.24	888.18	296.06
2	3	1,184.24	888.18	296.06
2	3	895.30	671.48	223.82
2	3	843.30	632.48	210.82
2	3	1,316.05	987.04	329.01
2	3	1,334.01	1,000.51	333.50
2	3	1,308.26	981.20	327.06

## (Defendants' Exhibit Q)

Asset Property  
Record  
Schedule Page

Item

Description

IV-B	4311	Automotive Equipment (Continued)	4—KS-6H—International Trucks equipped following: Overload springs—fish plated frame 825x20 tires on Budd wheels—Duals in rear Booste and reserve tank—2 long arms mirrors— arm woods hydraulic C-12—4 yard bod yards ends and 3/16" Flooring—Woods 1 FICS cam and roller type hoist, 3—42 gates—clearance lights & reflectors Serial Nos. 1004-KS-4502 A-1005-KS-66875 A-1006-KS-67374 A-1007-KS-67721
	4312		1—SK—6 H. International Truck equipped following: Serial No. K-S-6-6377—Overload spring fi frame 825x20—10 ply tires on Budd wheel in rear—Rooster brakes and reserve Tanks arm mirrors 1 signal arm—Woods 1 C-12"—4 Yd body W/5 Yard ends an flooring—Woods hydraulic FICS Cam ar type hoist—3-42" Batch Gates—Clearance reflectors

## SUB-TOTALS

2501-2 Pro-rata of Service Costs (For basis see notes on Summary Sheet)

## TOTALS

Portable Durable Tools  
& Automotive Equipment  
Page 2 of 2 Pages

	Depreciation Years to 12-23-44	Original Cost	Depreciation at 25% per each year or fractional part thereof	Option Price as of 12/23/44
3	2	11,948.00	5,974.00	5,974.00
3	2	2,987.00	1,493.50	1,493.50
		<u>\$ 95,196.99</u>	<u>\$66,935.34</u>	<u>\$28,261.65</u>
		9,077.46	(70.31%) 6,382.36	2,695.10
		<u>\$104,274.45</u>	<u>\$73,317.70</u>	<u>\$30,956.75</u>



(Defendants' Exhibit Q)

Option Price as of December 23, 1944 of the Facilities and Mac  
as Calculated by Gregory D. Smith from Assets-Property  
of Defense Plant Corporation Under Lease Agreement b  
Defense Plant Corporation and Tavares Construction Co  
dated December 27, 1941, and Amendments thereto.

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SUMMARY SHEET

Proration of Service Costs was arrived at by dividing total service costs of \$2,471,431.98 by total direct cost of \$2,471,431.98 and multiplying direct costs under each by the resulting percentage (9.53545%).

Depreciation on Service Costs was calculated at the same percentage that depreciation each schedule bears to original direct cost under each schedule. This percentage is shown in parenthesis in depreciation column.

RECAPITULATION

Schedule 1. Buildings, Ways, Docks, Structures, Improvements (fencing, paving, tracks, etc.,) and Building Installations other than Mechanical

Schedule 2. Installations (mechanical), Movable Equipment, Cranes, Tools, Machinery, Shop Fixtures, Laboratory and Test Equipment, Furniture and Loading and Lifting Trucks, etc.

Schedule 3. Portable Durable Tools and Automotive Equipment

GRAND TOTALS

\* From the option price of \$2,193,075.19 a deduction should be made in the amount of \$51,838.70 for work done at that portion of the original site which was later abandoned for use by the Navy and, therefore, is not included in the site subject to the option.....

NET

No. 248. U. S. A. vs. Land. Deft. Exhibit No. Q. Filed 2/19/47. Edmund L. Smith, Clerk; By P. D. Hooser, Deputy Clerk.

[Endorsed]: Filed Feb. 29, 1947. Edmund L. Smith,  
Clerk. [1277]

	<u>Original Cost</u>	<u>Depreciation</u>	<u>Option Price</u>
Costs	\$1,825,707.25	\$249,025.03	\$1,576,682.22
e Costs	174,089.50	23,745.80	150,343.70
	<u>\$1,999,796.75</u>	<u>\$272,770.83</u>	<u>\$1,727,025.92</u>
Costs	\$ 550,527.74	\$153,310.58	\$ 397,217.16
e Costs	52,495.30	14,619.94	37,875.36
	<u>\$ 603,023.04</u>	<u>\$167,930.52</u>	<u>\$ 435,092.52</u>
Costs	\$ 95,196.99	\$ 66,935.34	\$ 28,261.65
e Costs	9,077.46	6,382.36	2,695.10
	<u>\$ 104,274.45</u>	<u>\$ 73,317.70</u>	<u>\$ 30,956.75</u>
Costs	\$2,471,431.98	\$469,270.95	\$2,002,161.03
e Costs	235,662.26	44,748.10	190,914.16
	<u>\$2,707,094.24</u>	<u>\$514,019.05</u>	<u>\$2,193,075.19*</u>
Costs	\$ 17,298.81		
Costs	37,501.98		
	<u>\$ 54,800.79</u>		
e Costs (9.5354%)	5,225.50		
	<u>\$ 60,026.29 (13.64%)</u>	<u>\$ 8,187.59</u>	<u>\$ 51,838.70</u>
	<u>\$2,647,067.95</u>	<u>\$505,831.46</u>	<u>\$2,141,236.49</u>

REPORTER'S TRANSCRIPT OF PROCEEDINGS  
ON HEARING OF MOTION FOR NEW TRIAL. [1]

San Diego, California, Friday, June 6, 1947.

10:00 A. M.

The Court: Now, we will take up the lands case.

Mr. Berrey: I would like to present the judgment at this time, your Honor.

The Court: I have a copy of it and have read it over.

Mr. Berrey: The judgment has been approved by the government as to form subject to its objection, by the attorney for the Johnsons, by the attorney for National City, by the attorney for the San Francisco Bridge Company, by Leonard McLaughlin, and by the attorney for the County.

Mr. John M. Martin: If the court please, on behalf of the defendants Tavares Construction Company, et al., I want to very briefly object to the entry of the judgment on the ground it is not sustained by the record in this case. In order to make the grounds of my objection concise and very brief, I will state they are the same as those set forth in the motion for a new trial, the supporting affidavits and the memorandum of points and authorities, copies of which I have previously handed the court and government counsel. The only objection I would like to particularly direct the court's attention to at this time is that I feel that the issue of fact in this case have not been fully tried, having in mind particularly the fact that there was not submitted to the jury the issue of fact as to the date of the taking as to parcel A, [3] and the jury made no determination, nor has the court made any determination of that fact, and I feel the issues of fact have not been fully tried.

The Court: Mr. Monroe, do you want to say anything on that phase of the case?

Mr. Monroe: That, your Honor, doesn't have to do with me. The only reason I am here is because the government served me with an objection to the form of the judgment, and I am here to answer that objection. That is all.

The Court: You think this proposed judgment is correct?

Mr. Monroe: I think it is correct.

The Court: What is the objection?

Mr. Berrey: The objection which we are presenting here, your Honor, is to that portion of the language in paragraph 5, that is on page 11 of the judgment, which provides for the payment at line 30, "together with interest at the rate of six per cent per annum on the sum of \$650,000 from November 10, 1942, the date the United States entered into possession thereof, to October 3, 1944, the date of the filing of Declaration of Taking No. 1 and of the deposit of \$106,240 in the Registry of this Court . . . ."

It is our contention that inasmuch as there was no determination of the date of the taking of parcel A, that there is no support for the provision for payment of interest on that portion of the judgment which is apportioned to parcel A, that is, from November 10, 1942 to October 3, 1944.

We are presenting this objection as a precautionary [4] measure to protect our right in case the contemplated settlement with the City of National City should not be concluded.

The Court: What is the status of that?



Mr. Berrey: The status of that, as I understand it, is that the City Council has authorized the City Manager and the City Attorney to make the offer of settlement suggested by Mr. Dudley of the Navy Department. The formal resolution has not been received, but word has already gone forward to Washington of the proposal, and the machinery has commenced rolling to obtain the government's approval of the offer.

The Court: The last I heard was that the meeting had not been able to get a quorum, or get all of the members of the Board present.

Mr. Berrey: That was accomplished last Tuesday, your Honor. As I say, since then that information has been conveyed to Washington, to the Navy Department.

The Court: So that the Board did regularly meet, Mr. Monroe, in the past week?

Mr. Monroe: That is what I am informed, yes.

The Court: The City Attorney is here, and he probably knows. Mr. Campbell?

Mr. Edwin M. Campbell: Yes, that is a fact, your Honor.

The Court: Now, Mr. Monroe, if you want to say anything in response to counsel, you may do so.

Mr. Monroe: I am, of course, only interested in this [5] objection, and your Honor will recollect—

The Court: What page are you referring to in the transcript?

Mr. Monroe: First I have before me page 1260. It is the last volume, your Honor, the volume of February 27th, and it is the instructions to the jury. The court instructed the jury:

“With respect to such area the owners are entitled to recover the actual value of the land, that is to

say, the market value as of the time of the taking thereof by the United States Government, to-wit, on November 10, 1942."

That was the date which was fixed. Your Honor will recollect that was fixed over our objection. We were contending during the time that we should be permitted to introduce evidence of the value as of a later date, and it was held that November 10, 1942 was the deadline for the value.

Now, turning back to page 1257, it seems to me that as to parcel A the question was squarely presented to the jury as a question of fact. The court said at line 10:

"If you find that the condemnation and taking by plaintiff United States of America of Parcel A herein was a part of the same project for which the other lands herein have been condemned and taken by the United States of America, and that it was certain [6] on November 10, 1942 that Parcel A would be condemned and taken as a part of the same project for which the other lands herein condemned have been taken, then and in that event you must evaluate Parcel A in the same manner and use the same date of valuation as if Parcel A had been included in the original complaint for condemnation filed herein November 10, 1942."

So the decision of the jury fixing that is clearly a decision of fact in the case. I think the matter was squarely presented. Had we been permitted to put in evidence as to values subsequent to that date, we would have produced evidence of value considerably in excess of the value which was shown, but your Honor ruled that November

10th was the date, and our evidence was brought in as of that date. That date was submitted to the jury, and I see no reason why the judgment should not reflect exactly what took place and exactly what date the valuation was fixed at.

The Court: I think so, with respect to all of the interests except possibly the Tavares' interests. I notice that Mr. Martin here made mention of a conversation he had with the judge of the court in chambers with respect to that matter that there was evidence that to the mind of the court, so far as the Tavares interests were concerned indicated that there might have been some little variation, in so far as the [7] introduction as to parcel A, which was the submerged portion of the project, as to the date of taking with respect to any interests that the Tavares litigants may have had. But as to the taking itself, so far as the other interests were concerned, those who were seeking just compensation for the taking of either real property or submerged property, or property of a type that would be connected with the terrain itself, or with the waters themselves, as distinguished from the Tavares interests, I felt that there was a factual question there that should be covered by the instruction, and that was the reason that I gave the instruction which you have just called to the Court's attention on page 1257 of the transcript.

I think so far as the judgment is concerned that the date, November 10, 1942, should be the date concerning which interest matters are to be assessed, in so far as the recoveries that were included in the findings of the jury as concerned. The objection of the government will be overruled.

Mr. Monroe: I wonder, your Honor, might counsel for National City then be excused? I take it we have nothing to do with the other matter.

Mr. Sloane: And may that also be true of counsel for the San Francisco Bridge Company?

The Court: I think so.

Mr. John M. Martin: May we note an exception to the ruling, your Honor? [8]

The Court: Yes.

Just a moment. Is this the original of the judgment?

Mr. Berrey: That is the original which I presented to your Honor.

The Court: You have seen it, Mr. Monroe, have you?

Mr. Monroe: Yes, I have examined it. I think it is in good shape.

The Court: The judgment will be accordingly signed. I want to say one thing more before I sign it. I have not checked the computation of these various items. I assume you have all done so.

Mr. Monroe: I think they are correct, your Honor.

Mr. John M. Martin: If the court please, before other counsel leave I would like to have them stipulate that the motion for new trial, which I am presenting on behalf of Tavares, et al., may be heard at this time. We are in a consolidated situation here, where I don't know whether any of them want to be present or not.

The Court: Apparently Mr. Monroe has suggested, and Mr. Sloane also, and I saw Mr. Campbell assent with a nod of his head, that they don't care to be present.

Mr. John M. Martin: Very well.

Mr. Monroe: I see no reason why we should take part in the argument.



Mr. John M. Martin: I just wanted them to know I am going [9] to present a motion for a new trial today, and they may satisfy their own pleasure.

The Court: And the court is here to hear your motion for a new trial.

Mr. Monroe: As I understand it, a new trial might be granted as to them and not as to us.

The Court: That is right.

Mr. Monroe: And it might take such form that the court would decide the motion for new trial had to be granted as to everybody, which we couldn't help even if we were here, and I see no reason why we should take part in the argument.

The Court: I don't either, gentlemen.

Mr. Sloane: That is right. I had counted on two days, but if I am not allowed that, I will depart, your Honor.

(Thereupon counsel for the defendant, City of National City, and for the defendant, San Francisco Bridge Company, retired from the court room.)

The Court: You may proceed, Mr. Martin.

Mr. John M. Martin: If the court please, I would like at the proper time to file the original of the motion for the new trial, the affidavits and memorandum of points and authorities, and I would like to have the record show they are filed subsequent to the entry of the judgment which your Honor has just signed.

The Court: So ordered. [10]

(The documents referred to were filed.)

The Court: I have read the motion for a new trial, the supporting affidavits and the memorandum, so that you

need not take up any time in reviewing those matters, unless you desire to do so in your argument. Proceed.

Mr. Crouch: Your Honor, please, I will devote my argument to the presentation of two points; first, that there were additional instructions which should have been given to the jury, and second, that certain of the instructions which were given to the jury were erroneous.

I have no temerity in arguing these contentions because of the feeling that the court might have that I had a very low opinion of its legal ability, because this court knows that for over thirty-five years I have had an entirely different opinion, and through all of the years commencing at a time when we were both somewhat younger boys than we are today.

To my mind these errors are due to the fact that perhaps all of us were endeavoring to find something for use in this case when in the reported decisions there was no case like this one. I think it is quite evident that all of us were laboring in the dark in seeking to find the true rule for the assessment of damages to our client. That is I think quite apparent from the record, from statements by counsel, as well as by the court, and I think that it is also true that because this jury were also in the dark and were left in the dark until [11] the court instructed them and gave them a rule, that the reason why the verdict was zero as to our client was because the jury felt that it was their duty, as it was, to follow that rule.

Now, it is fundamental that under the Fifth Amendment to the Constitution of the United States private property cannot be taken for public use without the payment of just compensation, and this case was all about and devoted to an effort to find what in this particular situa-

tion was just compensation. Of necessity, from the record some compensation should have been awarded. The case was in that state before the jury was ever empaneled, before your Honor was ever requested to sit in it, because the ruling of Judge Yankwich on pre-trial, under the law, becomes a part of the judgment, which your Honor was obligated to follow, and on the 10th day of October, 1946 in Judge Yankwich's ruling on the pre-trial hearing as to the interests of the Tavares Construction Company, he specifically answered two questions:

(a) Have the lease and option rights of the Tavares Construction Company been taken and condemned in this action?

His answer was in the affirmative.

(b) Does the defendant, Tavares Construction Company, have a compensable interest in the property taken by the condemnation proceeding?

The court answered affirmatively. [12]

Now, you cannot compensate anybody by giving them zero. I don't need to argue on that point. The mere making of it shows that there is no answer to it. I might, however, although I almost feel like I am insulting the intelligence of the court when I do it, tell you what Webster says is the definition of the word "compensation."

Here are some synonyms: to remunerate; to make up for; to make amends for; to recompense; to counterbalance.

Suppose the rights of the Tavares Construction Company were put on one side of the scales. Could you counterbalance them by putting zero on the other side of the scale? Suppose we paraphrase Judge Yankwich's pre-trial ruling, and the question had been: As to the lease and option of the Tavares Construction Company in this

case, should they be compensated for it, should they be remunerated for it, should the government have given them something to make up for it, to make amends for it? And suppose Judge Yankwich had said, "Yes." It could not be any stronger than it is. That is the record.

Now, the erroneous instruction or instructions, because it occurred twice, that I refer to are found on pages 1263 and 1266 of the transcript. I read from your Honor's instructions:

"The interest of the Tavares Construction Company and its associates arises out of an instrument which is in evidence as Defendants' Exhibit W . . . ; [13] you are to determine what is the fair market value of the interest arising out of such instrument . . . ."

The Court: Pardon me, Mr. Crouch. I do not find that yet.

Mr. Crouch: I am reading from page 1263.

The Court: I have that page. What line are you commencing on?

Mr. Crouch: Line 5.

The Court: Line 5. You have the original instructions, I take it. Are you reading from that, or are you reading from the transcript?

Mr. Crouch. I am reading from the transcript.

The Court: The transcript commencing on line 5, page 1263, is, "to wit, what is the amount," and so forth.

Mr. Crouch: Well, the first one, your Honor, was on page 1263 of the transcript.

The Court: Page 1263. That is what I have.

Mr. Crouch: Line 5.

The Court: I will hand this to you. It may not be a correct copy.



Mr. Crouch: Yes. (Indicating)

The Court: I see. Right after the comma. I understand.

Mr. Crouch: Reading from line 5:

“to-wit, what is the amount for which the interest [14] of said Tavares Construction Company and its associates under said instrument of agreement could have been sold for on the open market for cash on December 23, 1944, the date it was taken or canceled by this proceeding or within a reasonable time thereafter; and in this connection if you find that the interest of the Tavares Construction and its associates under said instrument of agreement is so speculative and conjectural that no purchaser in the open market would have purchased the same except for a nominal consideration then your verdict as to the interest of the Tavares Construction Company and the Concrete Ship Constructors herein must be in a nominal figure only.”

And on page 1266, line 5:

“If you find the company could have made such a sale your verdict will be for the amount you in your judgment determine the company could have gotten for it. You will consider the entire instrument, not just parts of it. If you find it could not have been sold, then your verdict as to Tavares Construction Company, Inc. will be zero.”

I do not believe that is the law. Throughout this case various remarks were made by the court which indicated that it [15] had given serious study to the Miller case, and, in fact, to my mind the Miller case goes the farthest

in shedding light on these cases of any of them that I have read. But that case did not go far enough to fit this case.

Now, what I am trying to do, your Honor, this morning is to convince you that it was your duty, and still is your duty, to make some law in this case. This is a court of equity. This is an equitable proceeding. This court knows the history of courts of equity, and how they came into being. They were born because of the rigours of the common law. They grew out of and because of the injustices of the application of the rules of common law in England to peculiar cases, creating great hardships and inequities and injustices, because there was nothing under the common law by which they could do otherwise, and so the court's King's Bench got to taking cognizance of these peculiar cases, and they tried to find a writ, and they would issue a writ, and when they had a case where they found that they never had issued a writ in a similar case to guide them, they invented a new writ. That is to the credit of the courts of equity of England, and of the United States, and let me lay a fitting tribute at the feet of those courts of equity in this land of ours, because they have always been guided by the desire in every case to see that justice shall be done, notwithstanding the letter of the law, and totally irrespective of whether there was any precedent [16] for their action.

I started to talk about this Miller case and got off the track, because when your heart is full, your Honor, you will boil over once in a while. Now, the Miller case recognized that there might be cases where the rule laid down there would not apply, couldn't be used, and we all overlooked that. I read from the decision as reported in

87 Law. Ed. at page 342, the opinion written by Justice Roberts:

“The Fifth Amendment of the Constitution provides that private property shall not be taken for public use without just compensation. Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good condition pecuniarily as he would have occupied if his property had not been taken.

“It is conceivable that an owner’s indemnity should be measured in various ways depending upon the circumstances of each case and that no general formula should be used for the purpose.”

In other words, the court says there is no yardstick that will measure every right that is taken.

“In an effort, however, to find some practical standard, the courts early adopted, and have retained, the concept of market value. The owner [17] has been said to be entitled to the ‘value,’ the ‘market value,’ and the ‘fair market value’ of what is taken. The term ‘fair’ hardly adds anything to the phrase ‘market value,’ which denotes what ‘it fairly may be believed that a purchaser in fair market conditions would have given,’ . . .

“Respondents correctly say that value is to be ascertained as of the date of taking. But they insist that no element which goes to make up value as at that moment is to be discarded or eliminated. We think the proposition is too broadly stated.”

Now, here is the text of my sermon, and my entire morning discourse is to be on that text. It isn't in the Bible, but it is in the next best thing to it:

“Where, for any reason, property has no market, resort must be had to other data to ascertain its value; . . .”

Yet your Honor instructed the jury that if they did not believe that lease or contract could be sold on the market, their verdict should be zero. You told them that twice. And when the jury still couldn't get it through their heads, they came back for further instructions, and they didn't get any more light. You just reread those same things to them.

Now, I can appreciate your Honor's reason for that. You probably have found out from bitter experience of time that [18] when juries come back and you attempt informally to restate in other language the rules of law that you have already given them, you are liable to make a slip and get in something so they will reverse the case on you. So I can forgive you for that. But they wanted more light. They were confused.

Now, they had been told by the expert witnesses for the government that there wasn't any market for it. Mr. Landrum put those witnesses on, and I guess that the government is bound by their testimony. So we had a case before we ever instructed the jury, and before they ever started their deliberations, we had a case, so far as the government was concerned, where we had something for the jury to evaluate by the application of the market value rule in a case where there wasn't any market value.

There are lots of things in this world that are property within the Fifth Amendment to the Constitution of the



United States that have no market value. What could you get for your face on the open market? Much more than I could get for mine, but how many thousands of dollars of damages have juries awarded in this country because people disfigured a human face. Can you sell the pain and suffering that you endure when somebody disfigures your face? No. There is no market for it. It is peculiar, but your damages can be enhanced by such amount as, under all the circumstances of the case, the jury thinks is a fair compensation for the pain and the suffering which [19] you endure.

I have no doubt in the world that I could search through the instructions that your Honor has given to juries when you sat upon the Superior Court bench, and find one just about like this:

By the very nature of things the law can furnish you no accurate measure whereby you can determine in dollars and cents the exact amount to be awarded for pain and suffering in personal injury cases. Such amount, of necessity, must be left to the good sense and sound judgment of the jury, and your verdict should be in such amount as under all the circumstances in the case you deem just.

The Supreme Court of California has held that the right to practice law is property. What could you get on the open market for your right to practice law? And yet from anybody who illegally takes away from you your right to practice law, under the Fifth Amendment to the Constitution of the United States you can secure damages.

What could you sell for on the open market, or what could your wife sell for on the open market, your affections for her? But I got \$100,000 in cold hard cash

from a jury in a case where a woman alienated the affections of a husband from a wife. [20]

There is no yardstick that you can apply in any of those cases, any more than there was any yardstick that you could apply to the amount which the jury should have awarded in this case, under all the circumstances, to the Tavares Construction Company.

You invent a new and a secret method of making atomic bombs. You spend years of your life, and thousands of dollars of your money in developing that secret. The government starts to condemn it. How much could it be sold for in San Diego on the open market, or anywhere? Yet it is property, and if the United States Government desires it, it should recompense you for it, reimburse you for it, give you such amount as, under all the circumstances of the case, the jury thinks would be fair.

They didn't have that chance in this case.

Now, that is not the only time the Supreme Court intimated that at some time there might be a case where you could not measure the damages by a yardstick.

In *United States v. New River Colliers Company* in the 67 Law. Ed., in the Syllabus at page 1014 I read:

"The owner of property taken by the United States for war purposes is entitled to the full money equivalent of the property taken, and, therefore, to be put in as good position pecuniarily as it would have occupied if its property had not been taken."

And in Syllabus 3:

"The ascertainment of compensation to be paid by the government for property taken is a judicial function, and no power exists in any other depart-

ment of government to declare what the compensation shall be or to prescribe any binding rule.”

And Syllabus 4:

“Where private property is taken for public use and there is a market price prevailing at the time and place of the taking, that price is just compensation.”

Which is a correct statement of the law, and which also holds this, that in cases where at the time of the taking for public use there is no market price prevailing, some other rule must be used to determine the amount that will compensate the defendant.

I read from the case of *Monongahela Navigation Co. v. U. S.*, 37 Law Ed. 463, Syllabus 1:

“The compensation for private property taken for public use must, under the Fifth Amendment to the Constitution, be a full and perfect equivalent for the property taken.”

And reading from the decision of Mr. Justice Brewer on page 467: [22]

“\* \* \* It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*.”

I don't know what that last means. Make a note of it for me to look it up. Thank you.

“The language used in the 5th Amendment in respect to this matter is happily chosen. The entire Amendment is a series of negations, denials of right or power in the government, the last, the one in point here, being ‘Nor shall private property be taken for

public use without just compensation.' The noun 'compensation,' standing by itself, carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages, the former being the equivalent for the injury done, and the latter imposed by way of punishment. So that if the adjective 'just' had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective 'just.' There can, in view of [24] the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken."

Now, this whole law suit was predicated upon the proposition that the Tavares Construction Company's lease and option, and the possession under it, was compensable. That, of necessity and irrespective of whether it could be sold anywhere, means they were entitled to be paid and remunerated and be given money enough to recompense them. Why, they were in possession, with all their furniture, desks, and instruments and drafting boards, under a lease that had five years yet to run. Tell me of any judgment of any jury or of any court that will stand for a zero award for that valuable property to them. And they don't care whether or not anybody else wanted it or could use it, or whether it could be sold or couldn't be sold. We get right behind the Fifth Amendment to the Constitution of the United States and say to you and to the jury, "You can't do it." And we say to you that



you shouldn't wait, but that it is your duty here and now to see that this case is submitted to a jury under such appropriate instructions that they can give at least something.

And I read this sentence from the decision of Justice Brewer in the *Monongahela* case, as appears on page 472:

“Whatever be the true value of that which it takes from the individual owner must be paid to him [24] before it can be said that just compensation for the property has been made.”

I read from the case of *Olson v. United States*, 78 Law Edition, page 1244:

“The rule prescribed by the Minnesota Constitution is not, at least so far as concerns these cases, to be distinguished from that expressed by the just compensation clause of the Fifth Amendment and implied in the due process clause of the Fourteenth Amendment to the Federal Constitution. The judicial ascertainment of the amount that shall be paid to the owner of private property taken for public use through exertion of the sovereign power of eminent domain is always a matter of importance for, as said in *Monongahela Navigation Co. v. United States*, . . . : ‘In any society the fulness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government.’ The statement in that opinion . . . that ‘no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner’ aptly expresses the scope of the constitutional safeguard against the [25] uncom-

pensated taking or use of private property for public purposes.”

And speaking of the amount:

“He is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more.”

Then on page 1245 we have, as shown in this case, a situation where they could not use the market value rule. That is indicated by the following language:

“Flowage easements upon these lands were not currently bought or sold to such an extent as to establish prevailing prices, at or as of the time of the expropriation. As that measure”—citing this New River Colliers case that I read from a moment ago—“is lacking, the market value must be estimated.”

That is, you must assume that it had a market value, and we think the jury should have been given an instruction something like this, particularly in view of the fact that the government’s expert witnesses based their appraisal of zero largely or wholly upon the fact that nobody would buy it, because of the various reasons which I will advert to later on:

If you find or believe that there was no market for this lease and option, you should attempt to determine the amount of the damages [26] to the Tavares Construction Company by some other rule which I will now give you, and should disregard the one which I have given you as to what the property could have been sold for on the open market; and if you believe from the evidence that the property could not have been sold upon the open market, then your verdict

should be in such amount as, under all of the circumstances of the case, will justly compensate the Tavares Construction Company.

The Court: May I ask a question there?

Mr. Crouch: Yes, your Honor.

The Court: Where is the measure?

Mr. Crouch: Pardon me?

The Court: Where would be the measure?

Mr. Crouch: Just the same measure as if somebody disfigured your face?

The Court: In other words, you argue that the measure of compensation in eminent domain cases is the same as that in tort cases?

Mr. Crouch: Absolutely, and that is what I am trying to get your Honor to hold in this case. The jury would be entitled to have all the light thrown upon that in making that award, all of the facts and circumstances, the uses to which the plant could have been put for the length of time the [27] lease had to run, the amount which they would have had to have paid to the government in case they did exercise their option, and each and every element and factor should be given to the jury and they should have been told that if you find that this is a case where there is no market value, then you must assess such sum as, under all the facts and circumstances, you think will adequately compensate the Tavares Construction Company for the value of the property taken.

Now, if that is not the law, then I say in three decisions of the Supreme Court that I have just handed to you they were talking about a situation and a rule which should be applied in this case and didn't know what they were talking about. And I have never read a decision of Justice Brewer where he didn't know what he was talking about.

Those three decisions of the Supreme Court of the United States say that if you have a case where there is a market value, then you apply it.

Now, you ask me how are you going to measure it, and what measure are you going to use? Well, if you can think of some other measure that should be used, admitting that the market value does not apply, use it, use anything, except it must all have been predicated upon full reimbursement, full recompense. That is the trouble with this whole case. The court was laboring under the impression that it had to have a measure, and so it took a measure that the Supreme Court [28] itself indicates is lacking, and which the record shows in this case and the government's witnesses themselves testified was lacking. Can you think of a better way to do justice in this court of equity than the one that I have suggested? Then, if so, it is the duty of the court to invent it and apply it, because by the instructions in this case you are doing the very thing that common law courts in England did that caused the injustices when courts of equity were created for the purpose of making rules in peculiar cases. And if this isn't a peculiar case, I never saw one. On page 1255 of the record here is what was told the jury they had to do:

“\* \* \* The question for you to consider is this —if the defendants had desired to sell the property taken from them by the government, what could they have obtained for it upon the market, \* \* \*?”

Page 1251:

“\* \* \* You are to determine and award to the defendants as the market value of the land that price which they could reasonably expect to have received for the property in a sale upon the open market;  
\* \* \*”



Page 1255:

“\* \* \* The question for you to consider is this:  
—if the defendants had desired to sell [29] the prop-  
erty taken from them by the government, what could  
they have obtained for it upon the open market,  
\* \* \*”

“\* \* \* The inquiry in the case must be: What  
is the property reasonably worth in the market,  
\* \* \*

“In determining the fair market value of lands  
taken, the just compensation to the owner is that sum  
of money which, considering all the circumstances  
disclosed by the evidence, could have been obtained  
for the lands by an informed seller offering them in  
the open market for cash.”

No wonder the jury brought in a verdict for zero. Our  
witnesses testified it could have been sold for so much,  
but the jury didn't believe them. The government wit-  
nesses said it couldn't have been sold at all. Well, it is a  
poor rule that does not work both ways. Why didn't  
you apply it to National City? Why did you give an  
instruction that only applied to the Tavares Construction  
Company? Why didn't you tell the jury that if you be-  
lieve that the lease of the City of National City could not  
be sold upon the open market your verdict should be zero?  
And why didn't you tell the jury that under the law the  
lease could not be sold? Why send a jury out at all?  
Why pick out and apply that zero instruction just to the  
Tavares Construction? Why not give to the Tavares [30]  
Construction Company the same consideration that was  
given by the court in its instructions as to the City of  
National City? We all know that under the Tidelands

Act the leasehold interests of National City could not be sold. Why, Mr. Hotchkiss, and Mr. Anewalt and Mr. Bleifuss, our expert witnesses,—we could not have got a one of them to go on the stand and to swear that anyone could have taken the National City lease and go out on the open market anywhere in the world and have gotten five cents for it. Why? Because they would have known that would be violating the law, that they would have been violating the law by purchasing it. So you had to have some other criterion to measure the award. Why didn't you give us the same kind of consideration? Why weren't we entitled, under the law, to have the same rule of law applied to us as was applied to National City?

Now, if you would have given the same instruction as to National City's case that you gave as to the Tavares Construction Company's case, and the jury had followed your Honor's instructions, as we know they would have, nobody would have gotten a cent. I don't need to argue that, your Honor. You know it. Do you think that would comply with the Fifth Amendment to the Constitution of the United States? No, because under the Miller decision, and the Monongahela decision, and the Collier decision, and others, whenever you have a case where there is no market value, you can't use the market value [31] rule, then you must adopt some other measure.

Now, it isn't up to me. You asked me about the measure. It isn't up to me. That is your duty. That is your question, as they say. Of course, it is a part of my duty to give you all the aid I can as to the proper state of the law, and I confess I was remiss in that duty, but that is no cause for upholding an erroneous judgment and an unjust judgment, because I know this jury wanted to give us

something. They felt they couldn't, and follow the oath that they took when they were sworn.

Now, I call your attention, and I have said it was a poor rule that didn't work both ways, to page 1261 of the record, where you were instructing regarding the rights of the eight parcels owned by National City. I mean page 1260, line 9:

"The owners of property which is taken in a condemnation proceeding are entitled to recover an award of money for the taking of their property. With regard to the eight parcels of land owned by the defendant, National City, it is not claimed that there was any detriment suffered other than by reason of the taking of the described parcels; and therefore as to these parcels the owners are to be awarded that amount which will justly compensate them for the taking of such parcels. With respect [32] to such area the owners,"—I will skip down to line 20. "The market value is the highest price in terms of money which the land will bring if exposed for sale in the open market with a reasonable time allowed to find a purchaser, buying with knowledge of all the uses and purposes to which the land is adaptable and for which it is capable of being used. This contemplates a sale to be made in a reasonable time to a purchaser who is willing to pay what the land is fairly worth. . . ."

Why didn't you give the same kind of an instruction as to the Tavares Construction Company? Why didn't you tell the jury with reference to the Tavares Construction Company that the law contemplates in this a sale, as it does? We were entitled to have this jury told that they

must assume that there was a purchaser, and that if you find there was no purchaser, then you cannot bring in a verdict for zero for that reason alone, because in such an event you must assume that there was a purchaser who was willing to pay the fair market value of what it was worth. Now, you gave them that rule in the National City case correctly, but you told the jury that if they didn't think ours could be sold, the verdict should be zero. And with a proper instruction in the National City case, in a case where everybody knows it could not be sold, the verdict was \$750,000, and that is just the difference. In [33] one case they have got the law. In the other case, they didn't get the law, as I see it. I think in this case that the jury was left entirely in the dark, or largely in the dark, because of the fact that the attorneys for one side claim that the lease and contract meant one thing, and the attorneys on the other side said the lease and contract meant another thing. So all through the direct examination and the cross examination of the witnesses, both for the government and for us, it was a fight to see which attorneys would be most successful in getting the jury to agree with them on the interpretation of this lease and contract, and we think that the court should have interpreted this lease and contract, and not have left it to the witnesses and to the lawyers, and to the jury when they got out in the jury room, particularly when you told them on page 1246 that they had no right to consider the legal questions. I will make a guess. I wasn't in the jury room, I wasn't even a little mouse, but I would be willing



to make a guess that three-fourths of the time the jury were out they were talking about legal questions and trying to see what the contract meant, and what the rights of the Tavares Construction were under that contract, whether or not under that cancelable provision in it they could be canceled out at any time by the government. They had that all before them until they went out, and they were trying to figure out what the contract meant, and they, don't know yet what it meant. [34]

And counsel for the government tried to mislead them in his argument as to what is meant, trying to get them to bring in a verdict for zero because this contract had so many "ifs, ands and buts" in it, so that nobody would have anything to do with it. That left the jury confused and wondering who was right and who was wrong. When attorneys for one side present their case before a jury on the theory of their interpretation of the contract being the correct one, and the attorneys for the defendant present their case to the jury on the theory that their interpretation of the contract is the correct one, it thereupon, in my humble opinion, becomes the duty of the trial judge to tell the jury what is a correct interpretation of the contract, and that was never done in this case.

Let me show you how they functioned on that phase of the case throughout the trial. Let's look at Mr. Mason's testimony on page 1010, line 9:

"A. Yes; as I stated yesterday, the Tavares Construction Company had the right under this lease, as

I interpreted it, to have it free of rent if and only if they were constructing boats for the government."

The jury does not know. They are not lawyers. I submit the court should have told them whether he was right or whether he was wrong. Take the witness Mason at page 1017: [35]

"A. If I understand your question correctly, you want to know if I considered whether the word 'expiration' in paragraph 15 would be applicable to the date of 1947 and 1949?"

The witness made his own application. Counsel made his own application. The jury never were told who was right and who was wrong. That would make a difference in the value of this lease. Page 1018, the witness Mason:

"Q. What was your understanding of the contract provision as to that still being the date of termination \* \* \*?"

That is an improper question. I probably should have objected to it, but I have found, to my sorrow, that when trying a case before a jury, you start objecting and the jury gets the idea you are trying to make something out of it, and they magnify it so it is worse than if you let it go in. That is a legal question, of the jury's understanding of that lease and contract. There is no evidence in this case except perhaps, it is feared, that he based his valuation on the wrong interpretation of the contract. And

you could strike all of his testimony out. Then he says on line 12:

“It is my understanding of that particular phase that the Tavares Construction Company did have an interest to that date but, in my opinion, it was not valuable and was not marketable and, [36] therefore, had no value.”

Page 1021, line 21:

“Again repeating what I said a minute ago, if they transfer their rights from the Defense Plant Corporation to another governmental agency, that other governmental agency has to assume the responsibility of the Defense Plant Corporation until some provision came up whereby that was denied them, and Tavares would have the right to cancel under the 10-day notice, as I see it.”

The witness is telling the jury how to interpret the contract. Page 1044, line 9:

“The element of certain rights coming into being;”—now, all the while throughout this case, throughout the government witnesses and through the argument of government counsel they were trying to get this jury convinced that this option wasn’t worth anything because it never came into being.—“The element of certain rights coming into being; for example, the right to remain on the property, the right to an option. That was speculative. As evidenced in this court, it was cut off on December 23rd in a condemnation action.”

They were trying to get the jury to believe that our option wasn't of any value because it was cut off when the [37] government took it over.

Now, to show you that is what the witness believed, and counsel for the government did not correct him, he allowed at least this misapprehension to go to the jury, the government's witness said on page 1046, line 22:

"I mean that the option had not come into being."

May I suspend now, your Honor.

The Court: How much longer are you going to take?

Mr. Crouch: How much longer do I have, your Honor?

The Court: You have been talking about an hour and three-quarters. It lacks that by about four minutes.

Mr. Crouch: A half hour more, your Honor.

The Court: Gentlemen, I will have to ask you now, because the argument may proceed beyond the limitations of one day, unless I safeguard it, as I can see, how much time do you think both of you will take?

Mr. John M. Martin: I understood you to limit all of the defense to three hours. When that three hours is consumed, we will stop. We expect to abide by that decision.

The Court: So long as you have that in mind.

Mr. John M. Martin: We had it in mind, yes, your Honor.

The Court: Then I think we will meet at 2:00 o'clock.

(Whereupon, at 12:00 o'clock noon a recess was taken until 2:00 o'clock p. m. of the same day.) [38]



Los Angeles, California, Friday, June 6, 1947. 2:00 o'clock P. M.

The Court: You may proceed.

Mr. Crouch: On page 1047 of the transcript of the record we have the witness Mason saying to the jury:

"I mean that the option had not come into being; that Tavares did not exercise an option on December 23rd or prior thereto, that is, exercising any rights that he might have had to an option prior to the date of valuation herein. He did not take those steps necessary to give him the option."

Now, some of the jurors believed that. The court never, if I remember the record correctly, instructed them on that point.

Then on page 1043 counsel for the government got the witness to testify concerning the valuation of this lease and contract that there were so many ifs, ands and possibilities that, therefore, it hadn't any value.

Now, let's take the other government witness, Mr. Shattuck. Let's see how he convinced the jury that they should interpret this contract and lease. On page 917 of the record, at the bottom of the page, Mr. Shattuck tells the jury that this option could only come under one of two conditions, in order to come into existence. Well, it was in existence all the time. It was in existence, the option was, [39] at the time the government took possession. He told them that "in my opinion, only under one of two conditions, and if neither one of those two conditions came about and the government elected to go ahead under clause (b) of paragraph Fourteen, then they would have no option, as I see it."

I expect there was a lot of argument in the jury room as to whether we even had an option, or whether we didn't have an option.

Then on page 935 he says:

"With relation to the leasehold interest, it was my opinion that the terms of it were very uncertain and conjectural."

The court should have instructed the jury, I submit, that there was nothing uncertain or conjectural in the lease. There were no ambiguities in that lease and contract. There were possibilities of this or that not happening, but there was nothing uncertain or conjectural in the lease. The rights of the government were exceedingly definite and fixed, as well as our rights. I think the jury would have been helped then, in arriving at the verdict, had the court explained to them and told them what the rights of the respective parties were.

Then on line 16 of the same page Mr. Shattuck tells the jury that the lease could be canceled and no option could be had. That does not mean that if the lease was canceled that we weren't entitled to compensation for the value of the [40] option. But I know a lot of the jurors thought that, and that that was one of the arguments in the jury room.

On page 938 Mr. Shattuck says, at line 25:

"Well, it is my opinion that the whole thing was too speculative and conjectural."

At page 952 Mr. Shattuck was asked:

"So it is your understanding that under the lease the government had a right, through exercising its priority rights therein granted, to merely take over

and use this property, and thereby end and terminate all rights of Concrete Ship Constructors?"

Now, I personally know that a lot of the jurors believed that. They thought that under that clause in the lease, when the government took possession it put us out so far as any option was concerned, or so far as being entitled to receive any payment for it is concerned. And that is what Shattuck was trying to sell this jury. In fact, he says, "I don't think there is any question about it."

Well, that is a legal question; not a factual question. But he is trying to sell this jury on the idea that when the government took possession there, that under the contract they had a right to cut off all rights we had under the contract, under the option. Yes, that is true. But they also thought and they were told by Mr. Landrum, if I remember correctly, that when the government did that out of the window goes our [41] option and out of the window goes our right to compensation for it.

Now, I said some pretty mean things about counsel for the government in my address to the jury, because I could see just what he was doing. Now I want to pay him a compliment. I said he was trying to fool and mislead and confuse the jury. Now the compliment is, "You did a pretty good job."

Page 956:

"And is it your understanding that upon the expiration of the term ending December 31, 1949, that the lessee could on January 1, 1950 have elected to purchase?"

"A. No, he could not; not in my opinion."

A legal question. Page 959, and this is Mr. Shattuck testifying at line 4:

“Well, it may be that your question of why illustrates why I think this lease, coupled with an option has no price in the open market, for the reason that it is so conjectural and subject to so many interpretations and is so speculative that I don’t believe any informed purchaser would dare to buy it.”

Well, the jury believed that. They couldn’t understand it. They were not lawyers. But if the court had told them what the lease meant and what the rights of the respective [42] parties were, in appropriate instructions, they would have followed that. They would have said, “Why, the court has told us what this lease is, and what the rights of the Tavares Construction Company are.”

And they would have believed the court, and not Mr. Shattuck and Mr. Mason. As it was, they were privileged to believe Mr. Shattuck and Mr. Mason.

Now, another point that counsel got not only the witnesses to testify to, but alluded to it in his argument, was that it had no value because there was a clause in it that prohibited sale or transfer without getting the permission of the government and that, therefore, it had no value.

Well, now, the estate tax law of the Federal Government, Section 811, in defining what property shall be taxed as property of the estate in the event of the death of the owner, says:

“The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situate outside of the United States.”



Now, this court knows that there are a great many people who are the owners of valuable leases with clauses in them prohibiting assignment without the consent of the owner. Do you think for a minute that the Federal Government, in the [43] event a man dies holding such a valuable lease, or that the courts or appraisers or the Treasury Department wouldn't make them pay taxes on it? Why, there are Treasury regulations on the subject. They are to the effect that the government assumes that the assent could be obtained, and had Mr. Tavares died while this lease and option was in effect his estate would have had to pay estate taxes on that leasehold, the full value of the leasehold, and the government appraisers would have fixed that value, irrespective of that provision in the lease which prohibited assignment without consent, and irrespective of whether or not there was in the market a purchaser, or a possible purchaser. The Treasury Regulations cover that. Had Mr. Tavares died on December 23, 1944, by all of the laws and rules of the Treasury Department his estate would have had to pay a tremendous estate tax on the value of that leasehold and option, because it had a value. And yet on the next day, when the government takes possession of it, then government counsel comes in here, knowing, as he must know, the decisions of the Treasury Department, and the courts upholding it, and says that it had no value because of that provision and because it was something that nobody wanted to buy in the open market. Why, I submit if, just like here, counsel for the government was on my side of that proposition and he was representing the government before the Treasury Department, or before this court, or before the Circuit Court of Appeals, [44] where I was making such a foolish contention as that, that no

estate tax could be imposed because of that clause, that you had to get the consent of the lessor and therefore it had no value, or because nobody would want to buy such a shipyard out there at that particular time,—why, he could make a better speech than I could on that subject. Why, as to National City, the law is written into their lease which says it can't be sold, but why didn't he make such a contention and argument with respect to the National City lease and only make it with respect to us? There seems to be some reason or other which I fail to understand. I didn't get into this case early enough to know where or why, but it seems that the only one he wanted to beat in this case was us.

Now, let us see what Mr. Landrum did in his argument on these uncertainties and conjectures and interpretation of contracts before the jury. Page 1172. You know we have a peculiar kind of a fish in the ocean called— well, I have forgotten the name of it, but when it is pursued and is about to be caught it exudes a sort of a substance like ink in the water, which clouds it all up, and then it escapes. This is page 1172— or, I am sorry, but at page 1181 in his argument to the jury he says, and he must have had some purpose in saying it:

“I say to you that, in reading that document, if you can tell me what it means, then you are [45] probably a better man than I am. I tell you that, if the lawyers can agree on what that document means, they are better lawyers than I am. So, therefore, their rights stemming from Plancor 407 are what you are to determine.”

That is not true. Their rights under that lease were for your Honor to determine, and the jury was only interested in the value of those rights, and when counsel makes a plea like that to a jury, telling them that the lease was such that even he could not tell what it means, that no two lawyers would agree on what it means, and, therefore, it wasn't worth anything,—well, he got away with it because I didn't have time enough in the argument, and I don't know that the jury would have believed me if I had tried to point out the correct legal interpretation of the lease. It should not have been left to me, it should not have been left to Mr. Landrum, and, above all things, it should not have been left to the jury to determine what the rights of the Concrete Ship Constructors were under that lease. Nobody else told them. We argued, yes, our rights were this. They argued, no, they were that. The court didn't tell them who was right and who was wrong, and they went out to the jury room in a case which was so complicated, according to counsel's construction, that no two people could agree and he says: You take it out to the jury room and see if you can find out what it means, and if you [46] can't find out what it means and you don't know, and it is speculative and conjectural, and nobody will buy it because it is so confusing, bring in a verdict for zero. And the court doesn't tell them who is right and who is wrong.

Page 1183. Well, I would say that matter concerned that contract and a lot of the jury believed that the government had a right to cancel that contract, believed they did cancel the contract, and believed, therefore, what he says, "Now, if they had a right to cancel the contract and didn't have to pay anything for it, why, certainly it was of no value."

Page 1185, line 24:

“\* \* \* if it was terminated by virtue of that clause (b), if the government requested priority for another branch of the government and Tavares refused to give it, his option never came into being.”

And I personally know that some of the jurors thought that.

Page 1189, quoting a case of a willing buyer who comes to him, and he says:

“‘Why, Mr. Tavares, you can’t do that without you get the consent of the Defense Plant Corporation and the Maritime Commission. I wouldn’t give you five cents for it.’”

Trying to sell the jury the idea that because you had to [47] get the consent of somebody on a lease that otherwise would be worth millions, that, therefore, it wasn’t worth five cents, knowing, as he must know, that that is not the law when a man dies. Now, the same rule of law ought to apply in fixing the value of a man’s property just before his last breath as after his last breath.

The court may at least be thinking: Well, why didn’t you except to my instructions? Why didn’t you submit correct instructions, or ones you thought should have been given. There are two answers to that, and those two answers will be given by my associate counsel who will now take over.

Mr. Frank L. Martin, Jr.: If the court please, I want to go back and call your Honor’s attention to some things that happened here before the close of the trial, and I



refer to page 1073 of the transcript, at the bottom of the page. There the court stated:

“I have not been able yet to determine definitely those instructions which will be given and those which will not be given. I am still working on those. Before the argument and although it is not required strictly, because this is not an action covered by the Rules of Civil Procedure, I propose to tell counsel exactly what the charge will be. But I shall expect counsel to confine themselves to a discussion of the facts [48] and not the law.”

After that there was some more testimony, I believe, and there were the arguments. As I recall, it was getting late in the afternoon and Mr. Landrum had to catch a plane that evening, and through inadvertence for some reason that was not carried out. I would like for the record to show that we were not given that opportunity, to go over the charge before the instructions were given to the jury. We didn't know Mr. Landrum was going to argue the points of law to the jury although the court had instructed counsel not to do so.

Immediately after the conclusion of the argument the court gave the instructions to the jury. We didn't know what they were going to be. It was humanly impossible, so far as I would be able to do so anyway, after the court had read the instructions for, as I recall, about forty-five minutes, to get up and state all of the objections to those instructions, that is, to be able to remember them all and to accurately state them. I don't know whether it

would have done any good in the presence of the jury after they had been given and after the argument had been made or not. We were taken by surprise. The only basis we had was to rely on the Code of Civil Procedure of the State of California which states in Section 647, "Matters Deemed Excepted To," and among other things it says, "the giving of an instruction although no objection to such instruction was made; refusing to give an [49] instruction; modifying an instruction requested"; and so forth, are deemed to have been excepted to.

Now, we understood we were going under the Rules of Civil Procedure, and it was my understanding from the statement that I have just read from the transcript. That is my understanding of the law. The Code of Civil Procedure I understand we were going by. This condemnation proceeding was brought under the Second War Powers Act, which is Title 50, Section 630, which along about the middle of it says, "such proceedings to be in accordance with the Act of August 1, 1888 . . . Title 40, Sec. 257, 258)."

Section 258 of Title 40 is the conformity act, which states:

"The practice, pleadings, forms and modes of proceedings in causes arising under the provisions of Section 257 of this title shall conform, as near as may be, to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the State within which such District Court is held, any rule of the court to the contrary notwithstanding."

Section 257 therein referred to is the section on condemnation of realty, which cites "and other uses."

Also, in the case of *Eagle Lake Improvement Co. v. U. S.*, 141 Fed. (2d), page 562, the court stated: [50]

“If the Federal Rules of Civil Procedure had been applicable to the proceedings below (as the trial court ruled), the motion for a new trial would have been timely made and the appeal, being taken within three months of the denial of the motion, would have been within the time prescribed by statute. However, Section 2 of the General Condemnation Act of 1888, under which these proceedings were instituted, provides that the practice, pleadings, forms, and modes of proceeding in causes arising under the Act shall conform, as near as may be, to that existing at the time in like causes in the courts of record of the State within which the court is held. Except as to appellate practice and procedure, the Federal Rules of Civil Procedure did not affect this statutory mandate.”

Now, I would like to go further and cover a few points that Mr. Crouch did not quite cover.

The Court: Before you do that, Mr. Martin, not that it makes any difference on the matter at all, but just to be right on the record,—

Mr. Frank L. Martin, Jr.: Yes, sir.

The Court: —and I apprehend that is what all of you want to be,—

Mr. Frank L. Martin, Jr.: Certainly. [51]

The Court: —it certainly is the desire of the court, commencing after the giving of the instructions on page 1267 of the record, which is the volume for February 27th, after the giving of the instructions the court concluded by directing the jury as to the procedure that was

to be followed in making up the verdict as to form, and so forth.

Mr. Frank L. Martin, Jr.: I can't hear you, your Honor.

The Court: I will raise my voice. Can you hear me now?

Mr. Frank L. Martin, Jr.: Yes, sir.

The Court: After the court had told the jury forms had been prepared for their convenience only, and that they would retire to the jury room and commence their deliberations, on line 3 of page 1267 of the transcript the court stated:

"When you have done so, you will have the verdict signed by one of your number, whom you will appoint to act as foreman, and will then return into court with the signed verdict.

"Are there any exceptions to the charge, gentlemen?

"Mr. Landrum: If the court please, the government respectfully excepts to the court's failure to give plaintiff's requested instruction 1 and plaintiff's requested instruction 1-A.

"The Court: The exception will be noted. Any further exceptions? [52]

"Mr. Monroe: Your Honor please, the defendant, National City, excepts to the failure of the court to give its requested instruction No. 12. That you will recall we have discussed.

"Might I also add this, that we except to the charge relative to the verdict as to the San Francisco Bridge Company, in which, as I recollect, it apparently said, if I quote right, that there was to be



awarded to National City the portion of the value allocated to it, which I believe is not as written in the verdict. I think there is perhaps a thing there that might be explained to the jury.

"The Court: I think the instructions sufficiently cover the matter. It might be that we could elaborate a little without in any manner affecting the instructions which have heretofore been given.

"In other words, ladies and gentlemen, the award to the City of National City should be an award to that municipal corporation for the market value of the property taken, and when you have reached that figure, then you will consider the award which should be made to the San Francisco Bridge Company, and the total of the two must not exceed the value which you found to be the value of the interests of the City of National City. Does that clarify it? [53]

"Mr. Monroe: I think perhaps so. Might we also except to the portion of the charge that fixes the date of the valuation as to the Tavares parcels affecting National City? In that connection, your Honor, I simply refer to the arguments that I have heretofore presented to you, for the purpose of preserving those matters.

"The Court: Yes, the record may so show.

"You may swear the officers, Mr. Clerk."

I will not read it all because it just cumulates the record on the litigants. The jury then retired and proceeded to deliberate. Then later on, at 6:10 P. M. they came back for further instructions, and on page 1271 the following appears. I will not read it all, but just the

portion to direct counsel's attention to what the court has in mind:

"The Court: Mr. Foreman, Mr. Roberts, the court has received the following note, which was transmitted, I understand, by you to the bailiff: 'We would like to hear the instructions re Tavares leasehold. A. E. Roberts, Foreman.' You wrote that, did you?"

"The Foreman: Yes, sir.

"The Court: File it, Mr. Clerk. If I understand the request, Mr. Roberts, of course, the charge as a whole, ladies and gentlemen, pertained not only [54] to the Tavares interests but to all of the interests. So that the term 'just compensation' and 'market value' and all of those other features, credibility of witnesses and so forth, applies to Tavares as well as all of the others. But I apprehend what was meant was the three or four specific instructions that relate to that interest.

"The Foreman: That is right, sir.

"The Court: I will reread those. The record may show that one of the attorneys, Mr. Frank Martin, is in the court room."

Then the court reread certain of the instructions which appear in the transcript and which you gentlemen have. Then on page 1275 after having done so, the court stated:

"Those are all of the instructions, I believe, on that point. You may retire, ladies and gentlemen."

That is the record in the case.

Mr. Frank L. Martin, Jr.: Yes, that is correct, your Honor. I was there. The point I make is that we relied on law, or the exceptions given to us by law, and it would

have been a physical impossibility for me to have excepted to every error that happened.

The Court: You did not except to any of them, did you, Mr. Martin? I say you did not except to any. You say it would have been a physical impossibility to have related all [55] of them. You did not except to any, did you?

Mr. Frank L. Martin, Jr.: No. I was relying upon the exceptions given to me by law, as set forth in Section 646 and 647 of the Code of Civil Procedure.

The Court: Let me understand that a little more specifically. Is the court to understand that you are stating that you purposely did not take an exception to the instructions which the court had given?

Mr. Frank L. Martin, Jr.: I say it was humanly impossible for me to state all the exceptions that I would have had to state in order to cover all of the exceptions. I couldn't recall every instruction at the time in order to state the exception, and I assumed and understood that we were going under the Code of Civil Procedure of the State of California which says that it is not necessary, that it is deemed excepted to.

The Court: Is that the reason that you did not take any exceptions to the court's instructions?

Mr. Frank L. Martin, Jr.: Those are my two reasons.

The Court: What is the other one?

Mr. Frank L. Martin, Jr.: One of them is that I do not believe I would have been able to do it if I had tried.

The Court: And for that reason you didn't try?

Mr. Frank L. Martin, Jr.: That is right. There is one of the instructions that was given, and I am referring

to my [56] memorandum here, your Honor, to page 1. The court instructed the jury:

“\* \* \* and in this connection if you find that the interest of the Tavares Construction Company and its associates under said instrument of agreement is so speculative and conjectural that no purchaser in the open market would have purchased the same except for a nominal consideration then your verdict as to the interest of the Tavares Construction Company and the Concrete Ship Constructors herein must be in a nominal figure only.”

In other words, the instruction there was that the interests of the Tavares Construction Company under the agreement was speculative; not that the elements of value were speculative. In other words, that is a question of law for the jury to determine. Now, how could the Tavares title to this agreement be speculative? If there is something wrong with the title to the agreement, his interest under it might be speculative, or you may devise a tax title to a piece of realty, and if there was a cloud on it, if it wasn't clear, it would be speculative.

Going back again to the Eagle Lake Improvement Company case in 141 Fed. (2d) 562, and, by the way, this was a condemnation proceeding which involved some oil leases and the jury had brought in a verdict that the leasehold was valueless, at page [57] 564 the court says:

“Appellants' principal contention is that the charge of the court erroneously stated the law applicable to the issue of mineral value and was misleading, contradictory and prejudicial. The instructions to which objection was made in substance charged that the jury should find the mineral interests valueless unless



from the evidence it was believed that a reasonable probability existed that oil or gas in paying quantities might be produced. As held in *Olson v. United States*, 292 U. S. 246, . . . elements affecting value that depend upon occurrences which, though possible, are not reasonably probable, should be excluded from consideration as too speculative and conjectural to afford a basis for the judicial ascertainment of value. In Texas, however, a mineral lease is recognized by law as being property having a market value even if it covers undeveloped territory. Where oil interests are involved, a reasonable probability of successful development is sufficient to make leasehold estates of great value; indeed, where there is a reasonable possibility of production in paying quantities, mineral rights are a common subject of barter and sale, and therefore have a definite, ascertainable market value, [58] even where the prospects of successful development are too speculative and remote to be 'reasonably probable.' In any event, such leases have a nominal value.

"The mineral leaseholds here involved are immediately adjacent to a currently productive oil field. Whether or not that field is a domal structure the probable limits of which have been determined by exploration to reach to but not beyond the boundaries of the condemned lands, if the uncertainties are such that the mineral interests in the condemned lands are bought and sold in arms-length transactions for a valuable consideration, they have a market price translatable into a fair market value for condemnation purposes. The charge of the court did not directly state the law applicable to the issue presented, and was prejudicial to the rights of appellants."

Now, there is a further instruction that was given, in which the court said:

“Evidence has been received in this case with relation to the interest of the defendant Tavares Construction Company, Inc. That interest arises out of an instrument which is in evidence as defendants’ ‘Exhibit W’. That instrument is a lease [59] coupled with an option. In your consideration of that feature of the case you will proceed in the same manner as you proceed as to the market value of the land, the question being what could it have been sold for on the open market for cash on December 23, 1944, the date it was taken or canceled by this proceeding, or shortly thereafter, above what Tavares Construction Company, Inc., would have to have paid under all its terms and conditions.”

Now, to me that instruction was misleading. I think I know what your Honor had in mind, that you were attempting to talk about the option, the value of the option, which would be what it could have been sold for over and above what it would have cost to exercise the option. But the instruction goes to the entire leasehold, what this lease could have been sold for over and above what Tavares would have had to have paid under all of its terms and conditions. One of its terms and conditions was that he would have had to pay about, as I recall, some two million dollars if he exercised the option in it, plus the cost of the land, which to me would convey to the jury that he would have had to find a purchaser who had about \$3,000,000, who was willing to pay that for the lease in order to leave \$500,000 for Tavares.

Then the last instruction that was given, which must have stuck in the mind of the jury, is: [60]

“If you find it could not have been sold, then your verdict as to Tavares Construction Company, Inc. will be zero.”

Now, all the jury had to do was to look at paragraph 24 of that lease, and in the light of Mr. Landrum’s argument, wherein Mr. Landrum read that paragraph to the jury:

“Twenty-Four: Lessee will not without prior written consent of Defense Corporation and the approval of the Maritime Commission sell, assign, or pledge this lease or any of its rights or obligations hereunder, or sublease or permit the use by others of any of the property covered by this lease.”

There was no evidence of a consent of the Maritime Commission that they could sell this. Actually, this instruction was to bring in a verdict of zero. I know it was not intended that way, but that is actually what it amounts to. You tell the jury: If you find it could not have been sold, then your verdict will be zero. All they needed to do was to read that one provision of the lease saying that it could not be sold, and Mr. Landrum argued that very point to the jury, where he says:

“Mr. Willing Buyer, I want to sell you this lease. I want to assign it. I want to sublet a part of it to you. What will you give me?

“‘Why, Mr. Tavares, you can’t do that without [61] you get the consent of the Defense Plant Corporation and the Maritime Commission. I wouldn’t give you five cents for it.’”

That conveyed to the jury the fact that it could not be sold, that there was a legal prohibition against selling it, and where they were told in the very last instruction given them, "If you find it could not have been sold, then your verdict \* \* \* should be zero," then in that case the verdict is zero.

Now, there were a number of statements made by Mr. Landrum in his argument which I believe appealed to the passion and prejudice of the jury. For instance, on page 1180 of the transcript Mr. Landrum said:

"Whatever else may be said, Mr. Tavares is a capable business man. He cut himself in to this wartime Garden of Eden without the expenditure of a penny. He built concrete barges for the government of the United States at a profit, and now he asks you to put your hands into the pockets of the people of the United States and give him a half a million more."

And:

"But, my goodness, are you going to permit those people to go into the Treasury of the United States, when we come in here in a condemnation case, and get any more? [62]

"Well, if you think they are entitled to that, you give it to them. But if you think that it would be right for me to say to you, "I want to get some money out of this war business. I want you to spend \$2,700,000 to build me a shipyard to build concrete ships to sell to you at a profit, and then after it is all through and done, I want you to give me \$80,000 for building my own shipyard, and supervising that, and then on top of that I have taken the expenses, I have taken the vacations for my own office force.'"



Then on page 1190 it is stated:

“What they are actually doing, ladies and gentlemen, is coming into a condemnation case and trying to get damages against the government of the United States for what they claim is a violation of that contract.”

Your Honor, I think that is what we are entitled to in this case, the same measure of compensation we would have had if the government had just breached the contract, or they had just said, “We are moving in here. We are kicking you out. We are not going to let you exercise the option. We are rejecting you.” They have done the same thing through this condemnation action. I think our measure of recovery should be the same in either case. Certainly “damages” is just compensation. [63] Damages does not mean something that is more than just.

There is one further error to which I wish to call the court’s attention, and that is the admission in evidence of Plaintiff’s Exhibits 2 and 3. Those two exhibits are correspondence had shortly before the action was filed between the Navy and Tavares, where the Navy indicated they wanted to take this property over for other purposes; not to come in under the priority clause in it and operate this shipyard, but to take it over completely. And there was a letter written back as to certain terms they were willing to settle on. That was an offer of settlement or an offer of compromise of this very action. I believe it was error to permit that to go into evidence.

Mr. Landrum thereafter was permitted to comment on that. On page 1192 he says:

“Ladies and gentlemen, you are not going to give them more than they asked for, are you, before this

law suit was brought? And don't forget, that that was only their asking price then."

The Court: I don't remember the details of those exhibits. Were they offered on cross examination of a witness?

Mr. Landrum: Could I say a word, your Honor?

The Court: If you remember what the situation was, yes.

Mr. Landrum: Yes, and there was no objection.

Mr. Frank L. Martin, Jr.: Oh, yes. [64]

Mr. Landrum: Or no objection to one of them.

The Court: I do not mean whether there was an objection or not, but is the court correct in its recollection that those tokens were proffered on cross examination of a witness?

Mr. Landrum: That is correct, your Honor.

The Court: That was the court's recollection, and I think there is no error in it, if that is the case.

Mr. Frank L. Martin, Jr.: There is also the question that the verdict is against law, and the insufficiency of the evidence to justify the verdict, and inadequate damages. I think Mr. Crouch has pretty well covered that. But here the jury gave one hundred per cent, full pay and credit to the witnesses in their valuation for National City, yet those same witnesses testified for Tavares, and we have a verdict of zero. To me that indicates that the jury followed the instruction that they could not bring in a verdict for anything but zero; that they found that it could not be sold and so the verdict should be zero. I feel they obeyed the court's instruction on that.

The only evidence in support of the valuation in the record is that of plaintiff's witnesses. The defendants' witnesses all go to zero.

The Court: You mean the other way around, don't you?

Mr. Frank L. Martin, Jr.: The other way around, yes, your Honor. The defendants' witnesses are the only ones that [65] show any value, and they range from \$500,000 to \$750,000.

The plaintiff's witnesses all testify to no value, but they all based their opinions on erroneous interpretations of that lease. Mr. Shattuck in his testimony showed very clearly that his opinion was based upon the fact that he understood the government could cancel all Tavares' rights by merely requesting priority. Mr. Mason thought the agreement was too speculative because of the many ifs, ands and possibilities of this and that happening, such as the right to remain on the property and to an option being cut off by condemnation, upon his knowledge of what happened after the last war to another shipyard, realizing that we were out of war at the moment, in other words, basing the appraisal on 1947 conditions and not on 1944 conditions, and that the lease had been canceled by this condemnation action, and that there was no option to purchase.

That is the evidence that we know of that was based on erroneous interpretations of the agreement, and, therefore, I don't believe it constitutes any evidence of value. This verdict of zero is a miscarriage of justice. Certainly that lease was worth something. They were in there, a going concern, carrying on the business, and to just come in and say it has no value at all, well, I don't see how anyone could possibly say that, even if we could not have gotten the option, [66] could not have got a lease, or could say that they were just a tenant in there by sufferance, at will, with no rights except that the government

could have put them out whenever they wanted to, they were in there and were carrying on a business, and it was worth something.

The Court: The court will take a short recess.

Mr. Crouch: Your Honor please, unless you think of some further use that I can be of here, may I be excused?

The Court: Yes, indeed, Mr. Crouch. If you want to go, you may do so.

Mr. Martin: Your Honor please, whatever additional time we have I would like to have in reply to Mr. Landrum. Otherwise, I have no objection.

The Court: Very well.

(A short recess was taken.)

The Court: Proceed.

Mr. Landrum: If your Honor please, I feel that this case was one of the best-tried condemnation cases that I have ever had the honor to be connected with. I also desire to say that it is my very earnest conviction that there is no error and that this motion should be denied. It is my understanding that the defendants in this action had the burden and went forward with the evidence. That is correct. They now come into this court room with a motion for a new trial based, as I understand it, very largely upon the proposition that [67] this lease coupled with an option had no market value, and, therefore, they should have been permitted, although they did not ask this court to permit them to do it, that they should have proven the case differently.

Now, if your Honor please, they themselves took the burden of proof, put witnesses on that witness stand who testified to their opinion of the market value of this lease coupled with an option. In other words, they themselves proceeded to fix the valuation in this case, and that was



the method they used. Now they come in here with a motion for a new trial, and say that that was wrong.

I have also discussed here the question of Judge Yankwich's order. I understood Mr. Crouch to say that Judge Yankwich held that they were entitled to compensation. I haven't read Judge Yankwich's order since I was here in the trial of the action, but it is my recollection of that order that Judge Yankwich said, first, that the interests of the Tavares Construction Company were being taken in this condemnation proceeding and, second, that those interests were compensable. That is his language. So I do not think that Judge Yankwich has ruled that they must receive something.

Now, I also believe it to be the law that counsel, if he has no objection or he is dissatisfied with the court's ruling, I believe it is the law that he should apprise the court of that fact on the trial, and I believe it is the law that if [68] your Honor gave some instruction which they felt was erroneous, I believe that they must apprise your Honor of that situation at the time it arises in order that your Honor may have the benefit of whatever thoughts they may have in that connection. I do not believe that they can come in now and claim error when they took no exception to your Honor's instructions, even though there was error there. Now, as to this question of those instructions, why, if your Honor please, Mr. Martin said that he didn't know and he couldn't take those exceptions. I had copies, and he had copies of some instructions which I think your Honor gave, and that is one that they are taking an exception to now, and I believe they had those copies at least a week before your Honor gave the instructions. So it seems to me as though there isn't a great deal to that situation.

I desire to say to your Honor that I am familiar with all of the cases cited by counsel. As a matter of fact, I tried the Olson case, I tried the Miller case, and I tried the Eagle Lake Improvement Company case. The Eagle Lake Improvement Company case, as counsel has just stated, your Honor, involved oil and gas leases in Corpus Christi in connection with the Corpus Christi Naval Air Base. The case was tried twice. The instruction which your Honor gave with relation to speculation and conjecture was the instruction which Judge Hanney gave in the Eagle Lake case. It was reversed. In the [69] first trial the jury gave them zero for their oil and gas leases. It was not reversed on account of that. It was reversed because Judge Hanney instructed that jury that before they could give them anything for their oil and gas leases they must first find that there was a reasonable possibility that oil and gas could be produced in commercial quantities, and if they did not find there was a reasonable possibility that it could be produced in commercial quantities, the verdict should be zero. The Circuit Court of Appeals reversed by saying instead of using the word "possible" Judge Hanney should have used the word "probable." That is the reason the case was reversed.

We tried it a second time and the second time some of the leasehold interests recovered some money.

It is perfectly apparent to all of us that a market value of a lease is the difference between what it would sell for on the open market less the rent reserved. Now, there are many leases which are worthless, and such a lease is a lease where they would have to pay too much rent.

In sofar as the question of the jury being confused is concerned, the instruction that your Honor gave was the one with reference to speculation and conjecture, and that

is the language of the Olson case. The Olson case, as your Honor will recall, was the flowage on Lake of the Woods, and that case was decided by the judges themselves without a jury, and [70] they absolutely refused to give them anything based upon their reservoir values, upon the ground and for the reason that it was too speculative and conjectural. And I believe that any instruction is also proper where a jury is instructed that they must not take into consideration speculative and conjectural values. I believe that has always been the law. I see no error whatsoever in it.

Now, there was one question in this motion which disturbed me a little. As your Honor knows, I did not purchase daily transcript, and I had no transcript. I was a little concerned with their proposition with relation to the date of taking that they had raised, but I find that right in the record we have stipulated that as to the Tavares Construction Company, and that is stipulated in this record, it is December 23, 1944.

Now, in so far as the question that they raise with relation to the date of taking of parcel A, I do not believe they have made any particular argument of that here today, but the Tavares Construction Company is not concerned with that. That is the City of National City, and this jury had to arrive at a conclusion with relation to what would have to be paid for the land as to all of those parcels in order that they might arrive at a valuation of what they would have to pay for that option. So there is nothing to their proposition that the date of taking is confusing. [71]

Now, there is another thing counsel has said, that we seemed to be wanting to give the City of National City some advantage that they didn't have. Now, your Honor

will find that it is stipulated right in this record. The State of California was here, and it is stipulated right in the record that the City of National City had a fee title. That is an entirely different proposition from the Tavares situation. In other words, they say, "Well, the City of National City didn't have any market value. It couldn't sell it." The record shows a stipulation and the statements made by the State of California that they had a fee title. So I find no merit in that contention.

Now, your Honor will recall that throughout the trial of this action I made one particular point. Your Honor will recall that I repeatedly requested your Honor to rule as a matter of law that they were not entitled to anything under that lease and option on account of its being speculative and conjectural. I carried that all the way through the trial. I submitted as a requested instruction where your Honor would take that question as a matter of law, and your Honor didn't do that. Your Honor submitted that question to this jury as a question of fact, and I believe it is entirely proper for this court to say to a jury:

Ladies and gentlemen of the jury, if you find as a fact that this is so speculative and conjectural that it would have [72] no market value, your verdict should be zero.

I am not going to take up a great deal of time in argument of this matter. I have read the record and I find that they pick out certain portions of your Honor's instructions, and that if the whole instruction is taken by its four corners there is no error in it. It is true that they could pick out one little sentence here and there and knock it, and possibly point to it as error, but I certainly feel that under all of your Honor's instructions there is no error.

Now, there is just one other matter that I want to discuss and that is the question of misconduct in my argu-



ment. I feel if I may digress just a moment, that I am about the only one connected with this case that didn't have just exactly a fair deal, because I think that if Mr. Crouch could have his Bible, I should have been permitted to have mine. Outside of that, everything was all right.

Now, I did argue that that instrument was speculative and conjectural. I believe that was right. I believe I had a right to do that. I have tried any number of law suits where the jury's verdicts were zero. The Bridge of the Gods in Washington that Mr. Tavares tells he built, he got that contract and, if your Honor please, I tried that case, and I tried it twice. The verdict was zero in the first trial before Judge Black. In the Eagle Lake case counsel has just read the verdict was zero. If a man has a lease where he pays [73] \$500 a month rent, and it is only worth \$200, the verdict on that lease would be zero. That is a bad lease. I am not going to take up any more time on this matter, if your Honor please. It was a long trial, it was an important trial, and I am sure that the case was fairly and squarely tried.

In so far as this objection with relation to Exhibits 2 and 3 is concerned, there was no objection made to Exhibit 2, but there was an objection to Exhibit 3. I put them in on cross examination as an admission against interest by one of their witnesses. I think it was the gentleman who sits back here, Mr. Seabrook.

So I feel that, under all of the circumstances, they have had a fair trial and the jury has determined this question. We respectfully submit, your Honor, that their motion should be denied.

The Court: There was one question I wanted to ask you, Mr. Landrum, which counsel have not touched on

either, but which is specified in an affidavit, and that is that from your argument, according to the affidavit of John M. Martin in support of the motion for a new trial, the following quotation is made on the second page of that affidavit, commencing with line 6:

“Whatever else may be said, Mr. Tavares is a capable business man. He cut himself into this war-time Garden of Eden without the expenditure [74] of a penny. He built concrete barges for the Government of the United States at a profit, and now he asks you to put your hands into the pockets of the people of the United States and to give him a half a million more.”

Was there any evidence that there had been any profit made in this deal?

Mr. Landrum: Some, your Honor.

Mr. John M. Martin: None, in any way.

The Court: I am asking Mr. Landrum that question.

Mr. John M. Martin: Pardon me, your Honor.

The Court: You will have your opportunity.

Mr. Landrum: The evidence in the case, your Honor, was that he was to receive a certain amount of money for each ship which he constructed, and out of that amount there was something like \$341,000 which was to go as rental. There is another letter in here that goes to the question of profit, but it isn't very strong, your Honor. There is sufficient evidence to support that statement but, of course, the question of whether there was profit or not was not the real point in the case. I am frank with your Honor on that. The statement is that he built those ships, that he paid the rental out of the money he got for them. There is evidence in the contracts showing how

much he was to get for each ship. That is all in there. [75]

The Court: But, as I understand you, you said there was no evidence that the Tavares interests had made a profit.

Mr. Landrum: Well, I am not sure about it, your Honor. I wouldn't want to say.

The Court: I have been over the transcript some, but I haven't been over it thoroughly enough to conclude.

Mr. Landrum: Of course, I understand it to be the law, if I may be permitted, that counsel may draw any reasonable inference from the evidence in an argument.

The Court: Of course, an inference must be based on a fact legally proven, or a deduction from a fact that is warranted by the propensities of man.

Mr. Landrum: Yes, I understand.

The Court: That is the danger of it, if there is any danger, with a jury. I do not say that it happened, because I am not prepared now to rule decisively. I am going to read the record a little more thoroughly. I can see how if there were no evidence in the case and if the jury felt, which they would have a right to feel in view of counsel for the government's argument and the manner in which he tried the case, which was thoroughly and forcefully,—they might have said, "Well, the thing is so conjectural that, even assuming there is something to Mr. Crouch's argument," and I am not prepared to say that there is or is not, I doubt it, I think it is rather an ingenious argument, but, nevertheless, it is an [76] argument that appeals somewhat to one's sense of justice, and if the jury in taking up this contract concluded that it was so shot full of uncertainties and difficulties and contingencies that no one could estimate, which is not

really the strict line of a jury's function, because their strict line is to award and assess just compensation, but if they could not even estimate just compensation for the disruption of this contractual arrangement so far as the Tavares interests are concerned, I can see how they might have said, "Well, Tavares made a profit anyhow."

If there is evidence in the record that would have justified that statement, or that inferentially justified the statement, then there could be no complaint made that the jury accepted the statement. But if there isn't, I can see how possibly the twelve persons composing the jury might not be able to agree. Of course, that doesn't mean that they necessarily would have determined the converse of the agreement and found for the Tavares interests.

I will say just one further thing. Then I will hear what further you have to say, gentlemen. That is with reference to Judge Yankwich's ruling. I have read it three or four times and followed it in the case. Otherwise I would not have given the Tavares interests to the jury to decide. If the argument that is advanced by Mr. Crouch is secure legally and logically, the court should have told the jury that the Tavares [77] interest was to be compensated for; not that it was compensable, but that it was to be compensated, and to instruct the jury that they had to find a certain value of that interest. Judge Yankwich, in my judgment, did not say anything of the kind. He wrote an opinion on it, and in addition to that he made findings which are incorporated in the record, which we followed, and we followed them carefully to the letter, because it was a court of coordinate authority, and we always feel that in such matters the trial judges of coordinate authority should not attempt



to review one another's decisions. That would be chaotic and disruptive of orderly judicial proceeding.

Here it is, "Order Upon Pre-trial":

"The court, having considered upon pre-trial the matters heretofore submitted on September 30, 1946, calling for the determination of the nature of the interest of Tavares Construction Company, Inc., involved in this proceeding, does now, after consideration of the record and the joint stipulation filed on September 27, 1946, and the additional memorandum filed on October 4, 1946 and the argument of counsel, determine:

"(1) That the lease and option rights of Tavares Construction Company, Inc. granted under the 'Agreement of Lease,' dated December 27, 1941, and by the supplements thereto, have been taken and condemned by this action.

"(2) That the defendant Tavares Construction [78] Company, Inc. has a compensable interest in the property taken by this proceeding.

"(3) That the facts are as set forth in the joint stipulation and joint memorandum of counsel above referred to and the court's written opinion filed herein on October 10, 1946.

"Dated: This fifth day of February, 1947.

"Leon R. Yankwich, United States District Judge."

Now, in the opinion of Judge Yankwich it is stated as follows:

"The court having considered upon pre-trial the matters heretofore submitted on September 30, 1946, calling for the determination of the nature of the in-

terest of Tavares Construction Company, Inc. involved in this proceeding, does now, after consideration of the record and the joint stipulation filed on September 27, 1946, and the additional memorandum filed on October 4, 1946, and the argument of counsel, determine the said matters as follows:

“The court answers the two questions propounded to it which sum up the findings desired in the following manner:

“(a) Have the lease and option rights of Tavares Construction Company, granted under the “Agreement of Lease” dated December 27, 1941, and [79] by the supplements thereto, been taken and condemned by this action?”

“The court answers affirmatively.

“(b) Does the defendant, Tavares Construction Company, have a compensable interest in the property taken by the condemnation proceeding?”

“The court answers affirmatively.

“The court orders specific findings entered in accordance with such answers.”

And then the judge elaborates to some extent as to the deciding reasons for his conclusions.

That certainly, in my judgment, did not mean, as I apprehend my good brother Crouch argued, that all the court had to do then was to tell the jury: Now, ladies and gentlemen, you go out, and you haven't any right to say that there is no compensation due, but you go out and you must find that there is some compensation due the Tavares interests. You go out and put that in your verdict.

I do not believe that is the law or that would have been proper. It would have invaded the province of the jury. The law says that the jury shall fix the compensation in these condemnation matters, and for the court to tell the jury where there was simply the legal determination of the right to compensation, as the trier of the facts, that they were to fix that compensation and conclude that it had been proven, would [80] not have been proper. Mr. Crouch argues that there was nothing left to do but to tell the jury that they had to find something. I do not believe they did, and I believe the instructions were proper in which the court stated that if it were only nominal, according to the evidence, that is all there could be found. In any event, I cannot see where there would be any predicate for an award of compensation in an eminent domain proceeding without there being some evidence to show as to how that was to be estimated; in other words, to fix a standard for the fixing of the value of the interests taken, there must be some measure adopted. Even under the broadest interpretation of the Miller case, with which this court is in hearty accord, there must be something definite. Otherwise, it is a pure guess, to bring a jury in and tell them to go out and guess what the Tavares people lost. The pertinency of it is just what I have stated, that if counsel for the government, either in his zeal or because he felt there was some evidence that justified the statement, told the jury when the case was of that peculiar character, that Tavares made a profit, that is a mighty weighty thing to the lay mind. It might not be to the court, if the court were trying it, because the presumption is that the court does know the law in the case. That is the only phase of the case on which I think I want to review the record a little more thoroughly.

Mr. Landrum: In that connection, could I call the court's [81] attention that there was no objection made in the record and there was no exception taken in the record?

The Court: That is true, but I am not speaking of that aspect of it. I will not say any more about that.

Mr. John M. Martin: If the court please, at page 2 of the memorandum of the points and authorities, or, rather, page 2 of the affidavit which I made, I also quote from the record the following statement which Mr. Landrum made in his argument, as shown by page 1180 of the transcript:

"Whatever else may be said, Mr. Tavares is a capable business man. He cut himself into this wartime Garden of Eden without the expenditure of a penny."

Now, not only is there no evidence in the record to that effect, but none was offered, none would have been admissible, and it is so far from the truth that I can't help but comment on it. Here is a jury that have gone through the war the same as the rest of us.

To say that a man has cut himself in on a wartime project, a wartime Garden of Eden without the expenditure of a penny, without a scintilla of evidence in the case to show it, none offered and none would have been admissible, it seems to me was a serious and prejudicial statement against the rights of my client.

Now, passing back for the moment to the order which Judge [82] Yankwich made, perhaps I get a little different impression from that order because Mr. McPherson and I spent all day long arguing before Judge Yankwich, and the gist of the argument there was that the govern-



ment was contending, first, that the interest was not compensable in this suit, and, second, raising the question as to whether it had actually been taken; meaning, first, as to whether they were condemning any option rights, and then, next, as to whether I wasn't relegated to a suit in the Court of Claims on a contract of frustration, in not having been able to carry that option out. That was an extended argument, and what I wanted to know and what the government wanted to know was whether we were going to determine in this suit all of my rights to compensation, or whether we were going to try to take two bites of the cherry, and have the court here determine only the leasehold interest exclusive of the option and that the contractual provision to purchase under the option was something the government was not condemning and something the enforcement of which would have to be carried on in another forum, the Court of Claims. So when I came into this case I understood from the pre-trial ruling of Judge Yankwich that not only the leasehold estate as such was compensable in this action, but that the expert witnesses would be privileged to take into consideration the added value, if any, which the option feature gave to that leasehold interest. [83]

Apparently the court was not of that opinion, and I direct your Honor's attention to page 433 of the transcript, line 20, one short paragraph, where the court in speaking says:

"When it comes to the question of value of the option it seems to me that the case can be simplified by the optionee preserving in the Court of Claims anything subsequent to the date of the termination of the project."

Now, what your Honor had in mind by "termination of the project," and maybe I didn't understand you, but I understood by "termination of the project" you meant the date of the declaration of taking as to our claim, the date on which the government filed the declaration of taking, December 23, 1944, and terminated all of our rights or acquired them or kept them from coming into being, it doesn't make any difference how you classify it. It was my understanding, in view of Judge Yankwich's ruling that whatever added value that option had, that we could show by the witnesses, the expert witnesses in their appraisals, that they had given consideration to it and that the value of the option under well-established legal principles was the difference between the option price of the shipyard and what the shipyard could have been sold for, and that were I suing in the United States Court of Claims based upon this option contract for just compensation, [84] that that is the rule and yardstick for compensation which the Court of Claims would follow, the difference between the option price of the shipyard and what the shipyard could be sold for.

So I had intended in showing my values to the jury to prove or to have my witnesses testify that they had taken into consideration the option value, and that that was an enforceable right and that it was a valuable right. I wanted to show that the government by its declaration of taking on December 23, 1944, under the ruling of Judge Yankwich, acquired that option right. Now, I don't care whether you say the option had come into being or whether we had to have a 10-day notice. If it had not come into being, at least Tavares had a right to have it come into being, and for the frustration of that right and the prevention of that right he was entitled to compensation.

Except for this condemnation suit he could have sued in the United States Court of Claims, and he would have filed his action in the Court of Claims upon that option right. Or if we want to say it came into being and that it was in existence all the time, but was breached by the declaration of taking, I care not, even if it was breached we were entitled to have brought an action and to have sued in the Court of Claims and the court there would have applied the yardstick as to just value, just compensation, to-wit, the difference between the option price [85] of the shipyard, and what the shipyard could have been sold for.

The Court very properly instructed the jury that in weighing the expert testimony the opinion and conclusion expressed by the witness was no stronger than the reasons or grounds which he assigned to it. I wanted to show by evidence that my witnesses had taken into consideration and assigned as one of the grounds for the opinion of that expert as to value the fact that they knew there was a personal right of action in Tavares, as assignee, for the enforcement of that option or for the recovery of just compensation in the Court of Claims, and yet as the record shows at length, at the insistence of government counsel I was told I could not even talk about the Court of Claims and that I could not cross-examine and say:

“Had you taken into consideration, Mr. Mason, the fact that Mr. Tavares had the right to sue in the United States Court of Claims and recover the damages between the option price of the shipyard and what it could be sold for?”

I could not, in fairness to the ruling of the court, ask any kind of a question like that, and refrained from so

doing. Nor could I ask any of the experts whether they had, in arriving at their opinion as to value, taken into consideration as to this lease and option contract, that he had a right to enforce that option or to recover compensation for its breach, [86] or, if you please, to recover compensation because the government by its declaration of taking prevented it from ripening into an existing option which he could exercise.

Now, I am in the situation where I gather, from what the court said from time to time during the record, that the court felt that my value of the option was a matter to be presented to a subsequent forum, a different forum. I gather that from this statement, again at page 433, where the court says:

“When it comes to the question of value of the option, it seems to me that the case can be simplified by the optionee preserving in the Court of Claims anything subsequent to the date of the termination of the project.”

Now, as a matter of fact, if the court had the right in this case so to do, I would make no objection. The trouble is that with Judge Yankwich's ruling on pre-trial that my interest is being taken, all of it, and it is compensable herein, I do not see how any court here, except an Appellate Court that would reverse Judge Yankwich's ruling, could preserve to me an action in the United States Court of Claims, to file an action for damages.

I am confronted with the situation that as long as Judge Yankwich's order on pre-trial stands I have to prove all my rights in this court, they are all here, and the judgment [87] becomes *res judicata* as to all of them,—if I understand what the court has ruled, or intended to rule



in this case. And yet there was submitted to the jury the determination of the value of that option without their being permitted to hear in the argument by me, or in testimony by a witness, or from the court, or any other source, and they never even became aware of the fact that Tavares, as of the date of the declaration of taking, would have, except for the filing of this condemnation suit, a chose in action against the United States Government, which he had an absolute right to prosecute in the United States Court of Claims, the only court in which the government has consented to be sued, for an amount here involved, and that he was being deprived of that right under Judge Yankwich's ruling, because by this very declaration of taking the government acquired that right. I don't care whether it had come into being, into existence as an option, or whether it was a breach of it after it came into being. In any event, it was a contractual right.

Now, all of these decisions here, and I have searched them and have tried to find an exact case, and admittedly we can't, but they all boil down to where the courts have said repeatedly as to the value of property in these condemnation cases it is proper for the court or for the jury to take into consideration all of the uses to which the property can be put. [88]

Now, what are they condemning here? They are condemning a certain contractual right. When they condemn our Exhibit W, our lease and option contract, the most valuable use to which that contract could be put would be to found upon it an action in the United States Court of Claims for the recovery of compensation or damages as between the option price of this shipyard and what the shipyard could be sold for. And yet, as the record stands in this case, this judgment is *res judicata* of every right

that my client has and will continue to have just so long as Judge Yankwich's ruling stands.

The Court: May I interrupt you a moment, Mr. Martin?

Mr. John M. Martin: Certainly.

The Court: I recall that during the case, and maybe that comes from a reading of the transcript, there was a discussion at the bench with respect to a certain line of questions that were being propounded, I think by yourself, and the court and counsel, in the presence of the reporter, had quite a discussion concerning the reservation of rights before the Court of Claims. Is my recollection correct?

Mr. John M. Martin: Yes. Your Honor was proceeding on the theory that we could preserve and protect those rights, and that we could draw a line of demarcation, but I didn't feel I could and that I should make my offer of proof. I will read what I said at that time. Nevertheless, I felt in obedience to your Honor's instructions,—Mr. Landrum objected to my talking about [89] the Court of Claims, and your Honor said I would not be permitted to. I want to just read page 401 of the transcript.

The Court: Let me get that.

Mr. Martin: It is rather lengthy, but if you will start at about line 5 of page 401, or, go back and start at page 400, line 20. At that time I had in mind the admissibility of proof as to the consideration with which we had parted in this case by the condemnation of the lease and option contract. So if you will begin at line 20 of page 400 of the transcript where it states,—or, do you have the page before you there, your Honor?

The Court: Yes.

Mr. Martin: Thank you.

The Court: On page 403, Mr. Martin, and I am asking this because I have no independent recollection, commencing with line 13, after the discussion ensued about the reservation of a claim or suit in the Court of Claims, or if you will go back to line 9:

“Mr. John M. Martin: Plus the fact as to what the jury had to do with that. If I am strictly limited to the normal rule of eminent domain, then I am limited to the fair market value of my leasehold estate.

“The Court: We will cross that bridge when we come to it. I haven’t had from any of you yet your requested instructions, and I want them when we recess tomorrow night, at least.”

Did you hand up any requested instructions on that point?

Mr. John M. Martin: No.

The Court: I don’t remember [90]

Mr. John M. Martin: The only request I made, if the court please, was based on the theory on which I was permitted to offer evidence, and that was market value. That is the only evidence I was permitted to offer. If you will carry forward in the transcript there, there is a bit that is not material, but starting at, for instance, line 18, page 403:

“The Court: What I want to know is whether you gentlemen are together on the factual presentation of what you want to present to the jury.

“Mr. Landrum: No, your Honor. We seem very far apart. I can’t get counsel’s theory. If it is that he is entitled to claim some compensation from the government of the United States in a condemnation case for the reason it took away from his right in the Court of Claims—

“The Court: There are, of course, certain rights terminated by eminent domain proceedings. Sometimes those rights are such as, in the absence of the sovereign power, would not be considered just.

“Mr. Landrum: He certainly is not going to try a case before the Court of Claims and this jury, too.

“Mr. John M. Martin: I am of the opinion that you have raised the jurisdiction again on me. If [91] the court can accord me the same right as in the Court of Claims—

“The Court: You need not have any fear but what the court, in so far as it can, will permit the jury to find just compensation for the taking which the government has accomplished.

“Mr. John M. Martin: Then I don’t need a requested instruction.

“Mr. Landrum: I will say this, and I say it advisedly, that there are a good many more instruments of this kind. There are a lot of instruments that were signed up long after this case was brought. If counsel is going to be permitted, and I know he is not, to go and talk about the right to sue in the Court of Claims—

“The Court: No; he wouldn’t be permitted to discuss that. The court has stated that, as a matter of law, without indicating anything further at this time, the case will be submitted to the jury upon the theory that the jury shall fix just compensation for the taking that has been accomplished by the government at the time applicable to the case.”

Now, I understood there that in proper conduct of Tavares’ testimony the only thing I could do, in living up to the letter of your Honor’s ruling was to refrain from



discussing [92] Court of Claims before the jury, and to refrain from cross examination of witnesses as to whether they were aware of the existence of the right to sue in the Court of Claims to recover just compensation. And I felt I had no right to come back with Mr. Tavares on the stand at the time and ask him: Now, Mr. Tavares, did you in arriving at the opinion stated as to value take into consideration the fact that you had a personal and unassignable right in the Court of Claims, the only court in which the government under the Act of Congress had consented to be sued, to file a suit for the enforcement of your rights under the option, and that except for the requirement to prove your compensation here, you could maintain your right for an independent action? Now, just what would have been a proper way to get that before the jury is not disclosed by the record in the form of affirmative proof. But I assure your Honor the reason I did not make that offer of proof is because I felt it would be contrary to your Honor's ruling.

On the other hand, I had come into the case prepared to try the case; in view of Judge Yankwich's ruling, on the theory that our entire interest was being taken, including the option, and that our entire interest was here compensable, including our option, and that is the way I planned to try the case, so that when we were through we would have adjudicated every right we had. But now I am fearful, in view of Judge [93] Yankwich's ruling, that I have adjudicated every right and that I have done so at a time when your Honor really felt as stated here on page 433 of the record:

"When it comes to the question of value of the option, it seems to me that the case can be simplified

by the optionee preserving in the Court of Claims anything subsequent to the date of the termination of the project."

Now, it just seems to me that I was put in a situation there where, in obedience to Judge Yankwich's ruling, I had to put in my evidence and be forever bound in this suit, and where in obedience to your Honor's ruling I was told I should not do so, and I didn't do so. And I have said in my affidavit that I was taken by surprise.

I think had the jury known that, in addition to the value of the leasehold interest that a proper measure of the value of this option was its actual value, that you could not barter or sell it, but that its actual value was whatever you could collect upon it in an action in the United States Court of Claims. And what would be the rule in force in suing in the United States Court of Claims? Why, the difference between the market value of that shipyard and the option price of the shipyard. That would have furnished the added value of the option which the expert witnesses, under Judge Yankwich's ruling were entitled to take into consideration [94] When they testified as to their value of the entire leasehold and option estate then being taken.

Now, perhaps I was derelict in what I was trying to accomplish, but I certainly have been caught between one order of Judge Yankwich, which requires me to put in my proof and be forever bound by it, and your Honor's ruling, under which I was restrained from putting in the proof. The result is that the case has never been tried on its merits. The possessory rights may have gone in on the issue of market value, but the option rights of my client did not. True, they could not be sold, but that

would not make any difference in the United States Court of Claims, and the government would not be presumed to be bound by the market value, but they would weigh whatever damage you can prove you sustained, whether you could sell it for a nickel or for \$1,000,000. The proof would be the difference between the market value of the shipyard and the option price of the shipyard. That would have been the full measure of the just compensation for the value of our option, for the failure of the government to perform, or for what you might call contract frustration. I am not referring here to contract frustration in the sense as stated by Justice Butler, because there they were dealing with contracts where there was no privity of contract with the government. For instance, in World War I, where they would say the government would contract to take your entire output, and the government would requisition or take the [95] entire output of the factory, and I say I am tremendously damaged, but I have no privity of contract with the government. There the cases they have referred to as frustration of contract are a frustration of a third person. But in a case of this kind, where the contract is directly with the government and there is a direct privity of contract, whatever damage we have was an absolutely enforceable obligation until such time as we were discharged from that contract, and that was at the declaration of taking in the instant case. It seems to me that we have not been compensated. If that can be accomplished here, then the government has a defense to every suit now pending in the Court of Claims or that can hereafter be filed, and all they have to do is to condemn the basic contract, which is non-assignable by its terms, and instruct the jury that it can't be sold and that the verdict should be zero.

I do not believe for one minute that the Tavares Construction Company have had a chance to have their option rights determined on their merits by the evidence here adduced. I don't think sufficient testimony was permitted to go before the jury to even make the jury aware of the existence of such a right, inherent in the option contract, that Tavares could sue in his name and enforce it regardless of whether it could be sold or not, where you could not barter and sell a contract with a government, but where it has a [96] value, and I think the jury, in fairness and to prevent a miscarriage of justice, should have been informed as to that right.

As to stating the exceptions, I must confess that I have read a lot of law on the question as to how they intend and contemplate making applicable the Federal Rules of Civil Procedure, under our new rules in these condemnation cases, in the face of the Second War Powers Act, where they go back and adopt the old statutory procedure. But from everything I can learn and everything I knew on that subject at the time I was trying this case, it was my opinion that I had the alternative of either stating my exceptions and being bound by those that I could remember and state, or of not stating them and letting the law of the State of California preserve them unto me. It is my opinion that had I attempted to state any exceptions to the charge at the end of the charge to the jury that I would be bound by the enumeration of those which I stated, and as to any I couldn't remember it would be just too bad. I couldn't remember them all. I didn't feel I could intelligently state them. It was my understanding under the California law that my exception was saved, and that I could either state them or need not do it, and inasmuch as I could not do it intelligently from



recollection, I assumed that my rights were protected under the statutory provisions of Section 646 and 647 of the California Code of Civil [97] procedure. Since then I have briefed that question, and I think that is true. I do not think it makes it very difficult on the court, but it seems to me that when Congress added to our judicial provisions there that last sentence, that notwithstanding any rule of the court to the contrary, under our Federal Rules as adopted or by any supplementary rules that the local court might add thereto, that is the situation, and at the present time I still recognize confusion in how I am to make a record that protects the interests of my client. For instance, as to the entry of the judgment here, under the Federal Rules I should approve it as to form, if I have no objection as to the form. In trying to meet both the requirements of the California Code of Civil Procedure and the Federal Rules, I felt that the advisable thing was to be there on time and to state whatever objection I had.

I do feel there has been a miscarriage of justice here, and in order for a jury or a court without a jury to properly evaluate and compensate in a just manner Tavares for the taking of the option rights, that the court would have to have in mind the yardstick by which the Court of Claims, for instance, would compensate Tavares in the event the right to compensation was being there adjudicated, instead of, in obedience to Judge Yankwich's ruling, being here adjudicated. I am not to blame for that dilemma for the reason that the [98] United States Government, who wanted this shipyard, had a right to condemn the land or the leasehold estate or the interest in the land, and they had a right to condemn personal property. But I do say that they have not shown any public

necessity, and I know of the existence of no right through eminent domain to condemn a chose in action held by Tavares as to personal property. There is about \$2,000,000 worth of personal property here. Yes, they could condemn the personal property, and take the leasehold and condemn the option rights in the land, but I know of no public necessity and know of no right under eminent domain for the purpose of condemning a chose in action against the United States Government as to personal property, where that is a chose in action which the government itself has granted. That contractual right was granted by the United States Government to my client twenty-four hours after this suit was filed. I don't know what will happen in this case, any more than court or counsel, but suppose, for instance, some court some day holds that there was no public necessity for condemning the right of action, the chose in action which my client possessed against the United States Government as to the personal property. Suppose, for instance, that the court some day holds and reverses Judge Yankwich and says that the interest of Tavares, in so far as his option is concerned, has not been taken and condemned in this case, and that I have [99] and possess, by virtue of that fact, all the option rights that Tavares originally had, right up to January 1, 1950, but that the government having, as the evidence here shows, dismantled the property, removed it and changed it, has not performed that agreement, it would be a useless act for me to get performance. You will find a stipulation of record in the case that the government waived a 10-day notice, and it did not go before the jury because it was past the deadline of December 23, 1944, but you will find there in the stipulation an answer from Tavares asking the government to calculate the contract

price at which it might elect to ascertain what compensation it would give for the removal of the property, or what additional allowance they intended to make for the improvements they put on of \$1,000,000 or \$1,500,000. That letter was never answered. The whole correspondence is in the file. That was not material to this jury, but when you come down to the fact that some day some court may hold that while all of our right and title and interest in and to the land and to the interests in the land was taken, that as to our chose in action, our action rights in this personal property, that there was no public necessity, and it was not taken. They may hold that only our leasehold estate and property rights were taken, but that our contract frustration rights still remain. If they do, it seems to me that the acquisition cost, as determined in this action, is the con-[100] tract measure, which my client agreed with the United States Government twenty-four hours after this suit was filed would become the option price upon this site. And I am vitally interested in seeing that option price, that acquisition cost, is fairly determined, and at a proper time I shall demand in writing in this case that the United States Government present, for the use and benefit of the Tavares Construction Company, a motion for a new trial in this case.

I do not propose to have my client bound by an acquisition cost which is reached by stipulation or other than by condemnation decree, where I feel the judgment is exorbitant.

We are in a situation here where the same jury upon the testimony of the same witnesses goes clear to one extreme in the rendering of a judgment, a verdict against the government as to one set of defendants, for even more than, or, not only more than the government witnesses testified to, but even more than some of the claimants' witnesses testified to, and at the same time the same jury, upon testimony from the same witnesses, rendered a verdict against my client in favor of the government for zero.

We are in the anomalous situation, if the court please, where the sole issue is just compensation and of the government coming in and trying to negotiate and get our from under, and where the verdict has been carried by that jury to the very extreme on the one hand and against the government, and [101] trying to take advantage of everything the government gained by that same jury, on the testimony of the same witness, and going to the other extreme and bringing in a verdict against my client for zero.

If the court please, I do not believe that is just compensation. I do not believe that this court or any other court will ever so hold. I do not believe I have had a chance to present, fully present the issues of fact and prove value on all the issues of this case.

I am sorry I can't point to a particular case in point. I can assure you there are none. I have tried to find one. The fact that the issues are novel is not my fault.

Thank you.

The Court: I want to ask one further question about the record, Mr. Martin, or any of you, as to a matter that



I am not familiar with. Was there at any time any application made for the severance of the trial on the Tavares interests?

Mr. John M. Martin: No: There was some discussion back and forth, and, as a matter of fact, the last discussion was I think the day before the trial here I suggested to Mr. Landrum that, if he wanted to, I would stipulate that we go ahead and try the case and get it over with, but so far as the Tavares interests were concerned, I would stipulate that the court could decide the award to Tavares. I knew the legal principles in issue and I didn't think it would be proper [102] to go to the jury. But the case was delayed, it had been filed several years ago, and we felt it should be determined. But, so far as I am concerned, that offer is still open to the government. I will still stipulate now, if the government wants to make it, that I will submit this case to your Honor on the record without a jury.

The Court: I was not asking for that purpose.

Mr. John M. Martin: That is true.

The Court: But I was asking it for the pertinency the question has to the argument. Have you finished?

Mr. John M. Martin: I have finished, your Honor.

The Landrum: I have nothing further, your Honor.

The Court: I wanted to say this on that phase of it, that is was a complicated situation. I have presided in the trial of many condemnation suits, and all other types of suits for thirty-six years, both on the State and Fed-

eral benches, and both on the trial and on the appellate tribunals, and I have never encountered a condemnation case, with a jury I mean, which was as complicated as this case was. That is the reason that I asked whether there had ever been any request made for a severance if the jury were to be called. Of course, no complaint could be made about the litigants calling for a jury. The Constitution says they may have a jury to fix their just compensation, so that no one has a right to complain about a jury being called in an eminent domain case. I am not [103] stating it for that reason. There was a jury called, and it rendered its verdict here.

Mr. John M. Martin: Would the court like for me to state the reason that I did not feel severance was proper? It was only this, that there was pending in the State Court by one of the defendants in this suit, National City, a suit against Tavares for rents, and I had my counter-claims in this action set up, and with the pendency of this suit and seeing this court would first acquire jurisdiction of the parties and the right on the date of the declaration of taking that this matter should be here litigated, I did not see how I could agree to a severance and at the same time participate in the trial of a suit where National City was putting in its evidence as to that right.

The Court: I will have to read the record before ruling. You have made the motion, and it is submitted.

[Endorsed]: Filed Jul. 29, 1947. Edmund L. Smith, Clerk. [104]

[Title of District Court and Cause]

REPORTER'S TRANSCRIPT OF PROCEEDINGS  
ON HEARING OF MOTION TO CORRECT  
AND MODIFY RECORD AND JUDGMENT [1]

Los Angeles, California, Tuesday, December 2, 1947.

11:00 A. M.

The Clerk: No. 248—Southern Division, Civil. United States of America v. Certain Parcels of Land in the City of National City, et al. Motion of defendants Tavares Construction Company, Inc., et al., to correct and modify record and judgment.

Attorney Landrum for the Government and Attorneys Martin for the defendants.

The Court: Proceed, gentlemen.

Mr. John M. Martin: If the Court please, this is a motion I filed to modify and correct the record and judgment in this case. I filed a supporting affidavit and I will not repeat the statements in that affidavit, but somewhat explain what prompted me to file this motion.

After a careful examination of the record in connection with the settlement of the record on appeal, I personally was convinced, in such examination of the record, that it must have been the view of the trial court that the court was without power in this proceeding to determine the question of compensation for the taking or cancellation or frustration of the option contract held by my client.

I have tried to meet what is rather a difficult problem, that is, to set forth in my affidavit what I conceived to be in the mind of the court, from the impressions gained during [2] the trial and reading the transcript, but it did

appear to me that in the view of the trial court there was but one possible exception that the court had in mind in the conclusion it had reached as to lack of power to determine the question of compensation as to the option feature.

That exception was perhaps the jury could, by a direct finding, tell the court whether in the jury's opinion this option could be sold upon the open market and by reason thereof had a market value.

As I see it, the verdict in this case was really a directed verdict. The jury was directed or instructed that in the event they found that the option contract could not be sold, their verdict was to be for zero. After retiring for consideration of the case, they returned with the request that final instruction be again read to the jury, and the jury went out and promptly brought in an answer of zero. To me that was a very definite instruction to the jury, that if they found the option could not be sold—only on the open market—they were directed to so indicate their conclusion by the word "Zero" in the place for the verdict.

I think, had the court asked them to expressly make a special finding as to whether it could be sold, their answer would have been "No," the same as they put in their answer "Zero." If that is true, and by that I mean if my conclusion of the view of the trial court is correct, then the court, [3] instead of proceeding to determine just compensation or attempting to fix an amount of just compensation for the taking or cancellation of this option, should by its record and judgment simply have determined that, in view of the special finding of the jury, the court was without power in this proceeding to determine the question of just compensation.



If the judgment so provided, it would, as I see it, more nearly conform to the views of the trial court as I gained them from the record and from the trial. As it now stands, I have attempted in an affidavit I filed to point out the portions of the record from which I have drawn the conclusion or reached the opinion that I have just expressed. I will not at this time read that affidavit unless the Court desires to have me do so.

The Court: I have read it, Mr. Martin.

Mr. John M. Martin: Thank you.

The Court: Mr. Landrum, what have you to say about the matter?

Mr. Landrum: If your Honor please, may I in the beginning express my happiness to be in your court again. But I do feel, if the Court please, that it is about time there should be an end to this matter.

As I understand the motion and the moving affidavit, it amounts to nothing more nor less than a motion to amend a final judgment of this Court. I am, of course, not thoroughly [4] familiar or my recollection isn't just as clear possibly as it should be, in that we tried this case almost a year ago. I do know, however, that this record shows that by agreement there was submitted to Judge Yankwich two questions. I do recall very distinctly that at the beginning of the trial of this action your Honor stated that you considered yourself bound by Judge Yankwich's order.

In October, 1946, Judge Yankwich held, first, that the rights and interests of the Tavares Construction Company had been taken and condemned in this action.

Second, that the Tavares Construction Company had a compensable interest.

Now, when we started the trial of this case at San Diego, I recall very distinctly, although I do not know that the record shows it, that your Honor said that you were bound by Judge Yankwich's order. Of course, if your Honor please, I personally could see no reason for the presentation of that matter to Judge Yankwich, because it has always been my opinion, by virtue of the declaration of taking of December 23, 1944, the Government took all the rights and interest of the Tavares Construction Company. So I say that this question has already been passed upon by Judge Yankwich. It is part of the record here.

Then, if your Honor please, in addition to that, we came before your Honor on a motion for a new trial. That I believe [5] was on the 6th day of June, 1947. If your Honor will take the record that was made on that motion for a new trial, you will find that almost the same thing that he now presents was presented by Mr. Martin to your Honor at that time. And your Honor will recall, I am sure, the argument which Mr. Crouch made, wherein he undertook to say to your Honor that Judge Yankwich had said there must be compensation paid. Your Honor went into that at length in the record.

Of course, your Honor explained to Mr. Crouch that Judge Yankwich did not hold that that jury must necessarily return a verdict for some amount. The record is perfectly clear on that.

So, as I say, the matter was presented to your Honor on that motion for a new trial. That is the second time. Now we are here again.

If your Honor please, when I was assigned to try this case I came here. I was told that there had been some sort of an agreement or an understanding between repre-

sentatives of the Government of the United States and Mr. Martin wherein and whereby, if Judge Yankwich held that the rights of the Tavares Construction Company had been taken in this proceeding, that we would try it wholly and without raising the question of the jurisdiction of this Court in a condemnation proceeding to determine compensation for the taking of these facilities and personal property. [6]

Mr. Martin stated to me he had that agreement with Mr. Littrell, and if your Honor believes that, I carried it out.

Regardless of the handicap to which the Government might have been put in the trial of this action, I undertook to carry out what Mr. Martin said was the agreement.

Now I feel this way, if the Court please: There defendants assumed the burden of proof in this action. These defendants laid the pattern under which just compensation was determined in this case. These defendants placed upon that witness stand as their first witness Mr. Tavares. They followed him by Mr. Hotchkiss and they followed him by Mr. Anewalt, and to each and every one of those witnesses was propounded the hypothetical question, "What, in your opinion, was the fair market value of all the rights and interests of the Tavares Construction Company under and by virtue of Plancor 407, Exhibit W?" They laid that pattern.

They were the ones that determined that the question which that jury was to determine was the fair market value of the interest which Tavares acquired under and by virtue of that exhibit. I say to your Honor that this question has been answered, and it has been answered by this jury.

First, I want to say to your Honor that we have here nothing more nor less than a rehash of the matters which were presented to Judge Yankwich.

Second, that we have here nothing more nor less than a [7] rehash of the matters which were presented to your Honor at San Diego on the 6th day of June, 1947.

I also want to say to your Honor that this motion asks your Honor to determine the question of the jurisdiction of the Court of Claims, should this matter be presented to it. They come here and ask your Honor to say that they have left a matter which they can present to the Court of Claims. With all due respect to this Court, I very earnestly submit that it is beyond your Honor's power to determine whether or not the Court of Claims would have jurisdiction. And I say to your Honor that if they have, they have.

If this judgment stands as it is, if they proceed in the Court of Claims, it will be up to the Court of Claims to determine what the question of their jurisdiction is. And then I say this judgment has been appealed from.

This is an action in eminent domain, an action in condemnation, and I very earnestly submit to your Honor that this Court has no jurisdiction. This judgment has not only been appealed from, but the term in which it was entered expired on June 30, 1947. I believe it to be the law that where a judgment has been appealed from, the District Court has no jurisdiction to modify, vacate, or amend its judgment. And in support of that contention I respectfully cite to your Honor *Miller v. The United States* at 114 Fed. (2d) 267.

Now, this judgment was entered on June 6, 1947. The term [8] of court at which it was entered expired June



30, 1947. The authority of this Court with respect to this judgment ended with the end of that term.

I respectfully cite to your Honor *United States v. 534.7 Acres*, 157 Fed. (2d) at 828. That case was decided in 1946; 157 Fed. (2d) at 828.

I also cite *United States v. Smith*, 331 U. S. at 469.

In the *Miller* case the Court stated very plainly:

“The District Court has no authority to vacate a judgment by it entered in an action at law after an appeal from said judgment has been taken.”

Your Honor knows, and the record will show, that this case has been appealed.

Now, if your Honor please, along the lines of what I did when I tried this case, I have reduced this question of law to writing. I have a memorandum, if I might be permitted to hand it to your Honor, and I will hand counsel a copy of it.

Now, there is just one more word which I desire to say to your Honor, that counsel appears to rely upon paragraph 14 of page 14 of this judgment, wherein it is recited that this Court retain jurisdiction of this matter for the purpose of making any further orders, decrees, or judgments herein. I take it that he must rely upon that paragraph of this judgment as his authority against the decisions of the courts which I have cited to you. [9]

If your Honor please, this is a final judgment, and I am sure we all know that that paragraph is inserted in judgments in condemnation in order that the Court may make any further orders or decrees to carry out that judgment. It does not mean and it was not intended to mean that this judgment itself could be changed and amended. The new Rules of Civil Procedure do not

apply to condemnation cases, and that paragraph 14 of page 14 of this judgment does not give this Court authority to change and amend a final judgment which has already been appealed from.

I respectfully submit to your Honor that this case was fairly tried. They themselves assumed the burden and submitted to this jury the question of what was the just compensation for the taking of all the rights and interest which Tavares Construction had, by virtue of Exhibit W. That jury answered that just compensation was zero.

I respectfully cite to your Honor in that connection your Honor's own statement in this record to Mr. Crouch when Mr. Crouch argued that Judge Yankwich had held they must receive some compensation.

We have submitted this matter, and in all justice and in all fairness we very respectfully suggest there should be an end to this matter.

The Court: Before you answer, Mr. Martin, I want to call attention to what I think is a mistake in the record. I think [10] it would happen because of the phonetics that would be involved in the matter.

On page 435 of the transcript, being transcript of Thursday, February 20, 1947, the word "structure" appears on line 3. I think that word was "frustration."

Mr. Landrum: Yes, your Honor.

Mr. John M. Martin: That is true.

The Court: The reporter's transcript reads thus:

"I am not saying that there may not arise in some other forum a claim for structure breaches, and so forth, for damages of that kind."

I think that word "structure"—

Mr. Landrum: What page is that, your honor?

The Court: It is on page 435 of the record.

Mr. Landrum: If your Honor please, could I say just one further word?

The Court: That should be corrected in the transcript before it goes to the Court of Appeals.

Mr. Landrum: Your Honor understands there was an agreement between the Maritime Commission and the Tavares Construction Company on August 9, 1946, with relation to their re-negotiation and their further rights under this contract. That was not in evidence.

The Court: I didn't know that judicially. I have heard since, that happened. There was no way that the Court could be [11] apprised of that.

Mr. Landrum: No. It isn't in evidence, your Honor.

The Court: I understand later on there was something about that.

Mr. Martin, do you have anything to say?

Mr. John M. Martin: If the Court please, counsel in his memorandum states on page 2 that paragraph 14, page 14, of the judgment here in question is the usual paragraph inserted in judgments in condemnation proceedings, "under and by virtue of which the Court makes orders and decrees with relation to the disbursement of funds."

The provisions of our judgment are not so limited. They are general; they are broad. They retain jurisdiction of this Court for the purpose of making any order, and I assume that order would be any order necessary to carry out the true intent of the Court.

If through inadvertence or otherwise this Court has signed a judgment that does not carry out the true intent

of the Court, that intent may be perfected and carried out pursuant to the retained jurisdiction, as set forth by paragraph 14, page 14 of the judgment.

If, on the other hand, we are to assume that the Court is without jurisdiction, no jurisdiction retained, that an appeal has been taken, then Mr. Landrum is in error in saying that the Federal Rules do not apply. If that is true, then the Federal Rules do apply. For that reason I specifically mention the Federal Rules, particularly 75(h), in my memorandum of points and authorities, where there is an expressed authority granted either at the instance of the trial court or the instance of the appellate court, to modify and correct a judgment.

While I am not informed as to whether the 90-day period has now expired since the adjournment of Congress, so that the new rules are now effective, they contain additional provisions, but they also contain this identical provision 75(h) of the original rules, so that even if they are now effective by virtue of the expiration of the 90-day period since the last adjournment of Congress, even under those new rules the Court would have ample authority to do what is here sought.

With reference to Mr. Landrum's statement as to the understanding had between John M. Martin, as counsel for these defendants, and Mr. Ralph Littrell, I shall not go into that, other than to say that that understanding was not carried out. It is a matter which does not concern this Court on the hearing of this motion, unless the Court wants to confirm that understanding and ascertain what it was.

If the Court does want to ascertain it, I would like, by proper method, to show by Mr. Joe McPherson the instructions he did receive from Mr. Littrell. I would



like to show that later, the day before the trial at San Diego, when I found Mr. [13] Landrum was to try this case and Mr. Landrum told me he was not in a position to carry out those instructions and couldn't do it, I then called Mr. McPherson and explained to him the position Mr. Landrum had taken.

If we are going into that at all, I think it should be by testimony or affidavit of Mr. Littrell or Mr. McPherson and not merely on statement of counsel. For that reason I won't go into it, because it is not a matter—the negotiations were had first-hand with Mr. Landrum. I feel it would be unfair to go into it.

I do say that understanding was not carried out. I recall that on one occasion, out of the hearing of the jury, at the Court's bench, I said, "Mr. Landrum, you are again raising on me the question of jurisdiction in this case."

I don't think there is anything that the Court or counsel can do about that matter. If it is a misunderstanding, I am sorry it occurred. It has no weight or merit in the consideration of the matter before the Court.

The Court: This matter has given the Court some concern.

The Court has again refreshed its mind on the record. It did so to some extent at the time of the consideration of the motion for a new trial, but it has again reviewed the record in the case. The mind of the Court, I think, is pretty clearly expressed in the record. I have several portions of the record that elucidate the mind of the trial judge during the progress [14] of the trial, when the jury was present and in the absence of the jury, particularly the latter, with respect to the matter under consideration.

I wish it understood that while the Court will not detail all of the portions of the record that indicate the aspect of the situation that is now being discussed, it thinks it will be able to indicate sufficient to show clearly that the mind of the Court during the trial was resolute on one aspect of the case, and that was the question of the option.

On page 432 of the transcript, line 13, the following appears:

“Mr. John M. Martin: If the court please, at no time have we contended nor do we now contend that we had any right to the free rent use of any part or portion of this yard, its facilities or machinery, for any purposes other than ship work for the United States government.

“Mr. Landrum: Here is another angle to this case, if your Honor please,—

“The Court: Why can’t you dispose of that matter by a concession in the presence of the jury?

“Mr. Landrum: I am perfectly willing to do that but I think it would be material—if your Honor please, the thing we are concerned with here is the valuation of that leasehold interest. If they contend for a lease, the value of that lease is dependent upon how much it costs [15] them to stay in that shipyard. They have expenditures for insurance, for taxes, for guards, and all of those things. Now, if they contend that that leasehold has a value, what it will cost them to have that leasehold is admissible as going to the question of its value. We propose to show that they did have those expenses and that they even asked the government to pay a part of them.

"The Court: I think you are unnecessarily complicating the problem. The law of the case has been established as to the right to compensation for the leasehold. It is the option feature, of course, that is the only complex situation in the case. Otherwise, the General Motors principle and the principle laid down in the other cases that have followed the General Motors case are clearly determinative of the leasehold question, and that is going to be followed in this case. We are not going to overrule the principle of the General Motors decision for the injury that the lessee is put to by reason of the lawful termination of this lease.

"When it comes to the question of value of the option, it seems to me that the case can be simplified by the optionee preserving in the Court of Claims anything subsequent to the date of the termination of the project.

"Mr. John M. Martin: Our theory is that there is a deadline, that there was a deadline, of December 23, 1944, [16] the date when the government took, by operation of law, our leasehold estate, and as to this lawsuit I am limited to the market value of that.

"If, by virtue of some other contract with the government, they have agreed with me that I possess certain other rights covering the period subsequent to December 23, 1944, such rights are not involved.

"The Court: Do you take any different position?

"Mr. Landrum: No, your Honor. My position is simply this, that it is true that we are fixing the just compensation as of December 23, 1944, for the taking of this lease, coupled with an option, but I

contend that the question of how much that is worth is what is before this jury now. If I could say to the witness, 'Mr. Witness, in case you did retain that lease that you are claiming was valuable, how much would you have had to pay out in costs'—

"The Court: That is all within the terms of the date of fixation.

"Mr. John M. Martin: That is right, and I have no objection to that line. That was all I was asking for. I asked him if it wasn't a fact they had to pay rental at the rate of 10 cents—

"The Court: Anything that comes within the period up to December 23, 1944, is a relevant matter to this [17] case. Anything that occurred subsequent to that is not relevant in this case. I am not saying that there may not arise in some other forum a claim for frustration breaches and so forth, for damages of that kind."

Mr. John M. Martin: Pardon me. I would like for the record to show that it was Mr. Landrum who made the statement at line 20, page 434, and not Mr. Martin. The context there will show that.

Mr. Landrum: If I made it, I made it.

Mr. John M. Martin: That was your statement.

The Court: I don't recall that. That is something I wouldn't recall. It does seem that is contextual there.

Mr. Landrum: I don't know, your Honor, whether I said it or not.

Mr. John M. Martin: Very well.

Mr. Landrum: I suppose I did, if he says I did.

The Court: Let us continue on page 435, at line 5. Let me say parenthetically, before we do that, there is



a clear indication in the mind of the Court on this question of frustration, and the Court had entertained that throughout the case, that the question of the option was not necessarily correlated, insofar as condemnation was concerned, with the question of the leasehold estate. The question of the leasehold estate, I think, clearly was a matter that was subject to evaluation and award in this condemnation proceeding. [18]

There is nothing in Judge Yankwich's ruling that is counter to that conclusion, in my judgment. There is not anything in the ruling, either on pretrial by Judge Yankwich or during the rulings on evidence by the trial judge, or during the discussions with counsel in the absence of the jury, at the bench, but what indicates that it was clearly in the mind of the Court that if there be any question of frustration, that we were not in the proper forum in which to ascertain that feature of the case.

On page 435, commencing with line 5, the following appears:

"Mr. Landrum: I am afraid I am not getting my point over to you. I am sorry. To boil it down, it is simply this, your Honor. If they are in this case contending that they had the right to stay there, the right to possession under that leasehold, I am entitled to show how much that right of possession would have cost.

"Mr. John M. Martin: We do not contend we had a right to stay there after it was condemned.

"The Court: How could they contend that they had a right to stay there after the government terminated the contract?

“Mr. Landrum: No, your Honor; I am not saying it that way. That isn’t what I say. In arriving at the value of this lease, counsel said in his opening statement [19] that they had a lease under which they could stay there until 1949.

“Mr. John M. Martin: We couldn’t once the government terminated it.

“The Court: That was a pure prospective eventuality and that prospective eventuality was terminated by the government.

“Mr. Landrum: And the question is how much have they lost by reason of our termination of it. And what they lost must be determined by what it would cost to keep it.

“Mr. John M. Martin: There is no objection to that.

“The Court: You don’t seem to be at variance on that.

“Mr. John M. Martin: Your Honor, I am in rather a peculiar situation. My position here is that my client has another agreement, that is not involved, dated August 9, 1945, by which the Maritime Commission has agreed that, for instance, my attorney’s fees are an item of expense.

“The Court: Of course, you can’t determine those here.

“Mr. John M. Martin: No; I don’t want to do it and I don’t want it before the jury. But, if counsel for the government starts to go into all of the contracts my client has entered into since December 23rd— [20]

“The Court: He says he is not going to do that and, if he attempts to do so, he will not be permitted to do it.

“Mr. John M. Martin: I want a separate right to go to the Court of Claims—

“The Court: I have been trying, as far as we can, to keep this case separate and apart from any additional claim that the defendants may have against the government, which is litigable in the Court of Claims, and we will do that by adhering to that deadline of December 23, 1944. Anything that occurred subsequent to that is irrelevant to this issue unless the defendants bring it in themselves, and, if they do, then you have a right to respond to it.

“Mr. Landrum: Could I ask your Honor this? I trust that your Honor will indicate whether you think it is correct or not. It is, if the question is the value of that leasehold interest, then may I not be permitted to show how much it would cost them?

“The Court: I don’t know what you will be permitted to show. I think I know the rule established by those cases which were mentioned.

“Mr. Landrum: I am very familiar with the Petty Motors and the General Motors cases.

“The Court: Then, why don’t you follow the doctrine [21] of those cases? I am not going to overrule the Supreme Court. They fix the rule pretty strictly there. Let’s follow the Supreme Court.

“(Thereupon the proceedings were resumed without the presence and hearing of the jury:)”

I could mention several other excerpts that substantiate that view as being the view of the Court on the questions now under consideration.

In signing this judgment, there appears to be a statement in the judgment that is at variance with the mind of the Court, and was at the time the judgment on the verdict was signed. I will call attention to that.

I want it also noted that the proposed judgment does not appear to have been endorsed by any of counsel for Tavares Construction Company interests.

It was endorsed by the other defendants in the case, but I think there was no endorsement by them. Am I not correct, gentlemen?

Mr. John M. Martin: That is correct. And the record will show a specific objection just prior to being signed.

Mr. Landrum: At the time the judgment was presented to your Honor, they had not approved it, but Mr. Martin stated in the record, and it is in the record, his objection to that judgment. And it is not the objection he makes now.

Mr. John M. Martin: The objection, as near as I can [22] recall was that the record did not support the judgment. I can turn, in just a moment, your Honor, to what I said. It is at page 3 of the proceedings on the motion for new trial had on June 6, 1947.

The Court: What page was that?

Mr. John M. Martin: Page 3. It starts at the top of the page.



The Court: That does not touch the question that is under consideration now. The judgment, commencing on line 28, page 13, paragraph 10, reads:

“That the just compensation for the condemnation and taking by plaintiff of all right, title, and interest of defendants Tavares Construction Company, Inc., Concrete Ship Constructors, Lloyd S. Stroud, R. S. Seabrook, Stroud-Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page and Don F. Gates, in and to the real property designated as Parcels 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and A and hereinafter described, and all improvements, facilities and fixtures located thereon, and the option, leasehold and possessory rights granted to said last named defendants, or any of them, by that certain lease and agreement dated December 27, 1941, between Defense Plant Corporation and Tavares Construction Company, Inc., as amended (commonly known as Plancor 407, as amended), is nothing;” [23]

Then, in paragraph 11, commencing on line 8, at page 14 of the judgment, the following matter appears:

“That all right, title and interest of defendants Tavares Construction Company, Inc., Concrete Ship Constructors, Lloyd S. Stroud, R. S. Seabrook, Stroud-Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page and Don F. Gates, in and to the real property designated as Parcels 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and A and hereinafter described, and all improvements, facilities and fixtures located thereon, and the option, leasehold and possessory rights granted to said last named defendants, or any of them, by that certain lease and agreement dated De-

ember 27, 1941, between Defense Plant Corporation and Tavares Construction Company, Inc., as amended (commonly known as Plancor 407, as amended), have become and are hereby vested in the United States of America;”

The Court inadvertently and without any intent to do so signed that judgment with that word “option” in there, in that portion of the judgment.

I think it is clear that the trial court, while following what it conceived to be, and what appeared to it was, the ruling on pretrial, it did not enable this Court in condemnation to fix a value for what may or may not have been the frustration of an option right of the Tavares Construction Company [24] interests. It was and is this Court’s view that there should be no feature of this case that would prevent the interested parties, if any, from litigating as to what this Court conceives and did throughout the trial conceive to be the proper forum.

The problem comes in just how to express that appropriately under the applicable rules of procedures. I may say it has been our belief that the amended Rules of Civil Procedure are not yet in effect. There seems to be a difference of opinion among the districts.

In a written decision by Judge Wyzanski of Boston the other day, he held that the rules were not effective, that the Congress had not adjourned since sine die and therefore the rules as promulgated, prior to the amendments, by the Supreme Court would still be the rules of procedure in the District Courts; while Judge Reeves, of one of the Missouri Districts, at Kansas City, held counter to that; so the matter is in debate.

My own view is, and I think that is the consensus of our judges here—and I am not speaking for any of them at all—that the amendments to the rules are not effective. Even if they were, there would be no change in the situation here. The matter is how to reach it without, at least seemingly, being contumacious as far the Court of Appeals is concerned. I do not want the Court of Appeals to feel in any way that this Court, after an appeal had been taken, would feel as though it had jurisdiction in the sense [25] of deciding something differently from what it has always decided.

This Court's mind has always been centered on the fact that if there was any frustration of this contract it was not a compensable item in an eminent domain case. The deadline occurred on December 23, 1944, and that deadline was occasioned by the activity of the Government in taking over the leasehold. The question is if this is of an equitable character that could be reached in the Court of Claims on the theory of frustration of a contract. That, of course, is not one of those items that could be properly evaluated in an eminent domain proceeding.

I think probably we have a right to strike those words from the judgment.

There is a rule here, Rule 60 of the Rules of Civil Procedure, which reads:

“(a) Clerical Mistakes. Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

“(b) Mistake, Inadvertence; Surprise, Excusable Neglect. On motion of the court, upon such terms as are just, may relieve a party or his legal representative [26] from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding, or (2) to set aside within one year, as provided in Sec. 57 of the Judicial Code, U. S. C., Title 28, Sec. 118, a judgment obtained against a defendant not actually personally notified.”

Do you think, gentlemen, that by striking that word from the judgment that the judgment will then conform to what the Court has expressed to be its opinion throughout?

Mr. John M. Martin: I believe it will, your Honor, particularly in the light of the explanation showing the intent. If there is any doubt about it, I do not see why the Court could not insert a sentence in the judgment which, in substance, said that “The Court finds it is without power in this proceeding to determine the question of just compensation under the option.” That is the substance, as I understand the Court’s view, of this case, and has always been the Court’s view of this case. If there is any question as to whether [27] that view must be expressed, not only in the trial record but also



in the judgment itself, certainly in the interest of clarity I would like to have it definite.

The Court: I do not want to do this: I do not want either the litigants or any reviewing authority, or any other applicable judicial authority, to get the impression that this Court is changing its mind in the case or that it has any doubt but what it gave to the jury the law of the case in its instructions. I think I have shown that by the excerpts that have been read, and there are others that will substantiate that. There is nothing I have found that would operate to remove that impression. That was never in the mind of this Court, that any question of frustration of contract was litigated and terminated and adjudicated in this action of eminent domain.

Mr. Landrum: If your Honor please, may I respectfully say that the Government must stay with the position that it has already taken. We feel that your Honor is without jurisdiction. And may I also say this, your Honor please: We spent days in the trial of this case, upon the very question of the market value of that option. I objected to it, and it is in writing in this record, to the introduction of any testimony as to the market value of that option.

That objection indicates, if your Honor please, I feel, that the agreement which Mr. Martin claims he made with Mr. [28] Littrell was carried out to the letter. We did litigate the question of the market value of that option which was cut off by this condemnation. I say that for the purpose of the record, and I cannot change it.

The Court: I think we will conclude the matter by striking those words from the judgment, gentlemen, and leaving the judgment as it will be with those words stricken.

Mr. Landrum: Could I ask what the exact words were, your Honor?

The Court: I thought I had gone over those once.

Mr. Landrum: Your Honor stated this: "The Court inadvertently and without any intent so to do signed that judgment with that word 'option' in there."

The Court: I called attention to the paragraphs in which it was.

Mr. Landrum: Yes, you did, your Honor. I understand your Honor intends to strike one word only, and that is the word "option."

The Court: That is all.

I call attention further to another observation which to me strengthens the determination as to what was the action of the Court. The verdict of the reads thus:

"In the District Court of the United States  
In and for the Southern District of California  
Southern Division [29]

"United States of America, Plaintiff, vs. Certain  
Parcels of Land in the City of National City, County  
of San Diego, State of California; Tavares Con-  
struction Company, et al., Defendants. No. 248-SD  
Civil.

### VERDICT

"We, the Jury in the above-entitled cause, sworn  
and empanelled to determine just compensation for  
the condemnation and taking of certain property  
herein involved, find the just compensation to be as  
follows:

"Parcel 9 (known as the Johnson land) \$ 6,750.00

Parcels 1, 2, 3, 5, 6, 7, 8 and A (known  
as the City of National City Land) . \$650,000.

Out of which last named sum we allocate  
to the San Francisco Bridge Company as  
just compensation for the condemnation  
and taking of its leasehold interest . \$ 50,000.

To Tavares Construction Company, Inc.,  
a corporation, Concrete Ship Construc-  
tors, a joint venture, Lloyd S. Stroud,  
R. S. Seabrook, C. M. Elliott, Carlos  
Tavares, Henry M. Page, Don F. Gates  
and Stroud-Seabrook, a copartnership,  
for the condemnation and taking of all  
their interests under the agreement of  
December 27, 1941 (known as Plancor  
407, as amended) \$ 0 [30]

"Dated: San Diego, California, February 27, 1947.

"A. E. Roberts, Foreman."

Now, anything that occurred subsequent to December 23, 1944, could not have been subject to that appraisalment, and therefore the question of the frustration of a contract, which is not a question of the appraisalment of the value of the property that is taken.

It may be there will be features that could not be properly considered in an eminent domain case in the appraisalment of a piece of property, whether it be real, personal, or mixed, that is taken, that would be properly considered in a proceeding before the Court of Claims.

Now, there are two other recitals in the judgment wherein that word "option" is mentioned.

Mr. John M. Martin: That is particularly true, your Honor, at page 8, line 17, XI of the judgment.

The Court: Yes. That is the word "option" on line 17 of page 8 of the recorded and entered judgment.

Then there are two or three recitals earlier in the judgment where the word is used again. But that may be merely a recital.

Page 2, line 27:

"Thereupon, evidence both oral and documentary having been introduced by and on behalf of plaintiff and said defendants upon the issues before the court and jury, [31] including the issue of the just compensation and the fair market value of Parcels 1, 2, 3, 5, 6, 7, 8, 9 and A, and the right, title and interest of defendants Tavares Construction Company, Inc., Concrete Ship Constructors, Lloyd S. Stroud, R. S. Seabrook, Stroud-Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page and Don F. Gates, in and to Parcels 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and A herein, and all improvements, facilities and fixtures located thereon, and the option, leasehold and possessory rights granted said last named defendants, or any of them, by the aforesaid lease and agreement dated December 27, 1941, as amended, and the jury having heard and deliberated upon the evidence and having reported to the court its Verdict."

It appears again on line 15, page 6, paragraph VII, which reads as follows:

"That plaintiff, by its Declaration of Taking No. 1, filed herein on October 3, 1944, its Amended Declaration of Taking filed herein on December 23, 1944, its Amended and Supplemental Complaint in



Condemnation herein, and its Bill of Particulars filed herein on April 16, 1945, which Bill of Particulars is considered as an amendment to plaintiff's Amended and Supplemental Complaint in Condemnation, has taken and condemned all of the interests of defendants Tavares Construction Company, Inc., Concrete [32] Ship Constructors, Lloyd S. Stroud, R. S. Seabrook, Stroud-Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page and Don F. Gates, in and to the real property designated as Parcels 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and A, and hereinafter described, and all improvements, facilities and fixtures located thereon, and the option, leasehold and possessory rights granted to said last named defendants, or any of them, by that certain lease and agreement dated December 27, 1941, between Defense Plant Corporation, and Tavares Construction Company, Inc., as amended (commonly known as Plancor 407, as amended)."

I think the word "option" should be stricken there, and it is stricken there.

The term is used in paragraph X, but I don't know whether the use of it therein runs counter to the views of the Court on the matter.

Paragraph X, beginning on line 23, page 7, reads thus:

"That prior to December 23, 1944, defendant Tavares Construction Company, Inc., was the lessee of the real property designated as Parcels 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and A and described in plaintiff's Declaration of Taking No. 1, Amended Declaration of Taking and Amended and Supplemental Complaint in Condemnation, and hereinafter described, together

with all improvements, [33] facilities and fixtures located thereon, under that certain lease and agreement dated December 27, 1941, between Defense Plant Corporation, an agency of plaintiff, and Tavares Construction Company, Inc., as amended (commonly known as Plancor 407, as amended), which lease and agreement also granted to defendant Tavares Construction Company, Inc., certain option rights to purchase said real property, together with said improvements, facilities and fixtures, and that Carlos Tavares, Henry M. Page and Don F. Gates, no other person or persons have or then had any right, title, interest or estate in and to said lease and agreement except the defendants Concrete Ship Constructors, Lloyd S. Stroud, R. S. Seabrook, Stroud-Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page and Don F. Gates.”

Mr. John M. Martin: That is merely a recital that we are the owner of that interest.

The Court: I do not think that—

Mr. John M. Martin: There is no reason to change that.

The Court: I believe we have indicated wherein the entered judgment does not reflect the judgment of the Court, and accordingly it should be entered so as to indicate the views of the Court.

Mr. Landrum: If your Honor please, I take it that your Honor's order will be reduced to writing?

The Court: I would think so. Either that or I should [34] sign this oral opinion.

Mr. Landrum: May the record show, your Honor, that the Government respectfully excepts to your Honor's order and ruling made at this time?

The Court: It may so show. I do not think we should amplify the record in any other way, gentlemen. In other words, if the matter proceeds on review in the Court of Appeals or elsewhere, I want those courts to know just what this Court is doing. I am not going to amplify that judgment. I think it does not show what the Court did or what was in the mind of the Court. I think the oversight or omission should be succinctly stated. And, Mr. Landrum, that you should remain here until such time as it is submitted, and it should be submitted, I think, with celerity, so you can get away, so that it will not be left to someone else here to determine whether or not the record will reflect what the Court is doing.

Mr. John M. Martin: If the Court please, due to the fact this motion was pending, I have heretofore applied to the Circuit Court of Appeals for an extension of time in order that whatever ruling and record is made here may be transmitted as a part of the record on appeal. The time has now been extended to December 24, 1947.

It seems to me there is no way that I could state, or that anyone else could state, more clearly your Honor's views [35] than you have heretofore stated them in the record. If that record, as stated by your Honor, is made a part of our record on appeal and is transmitted, as we have and will request, it seems to me it would more accurately portray what your Honor has in mind

than for me to attempt or Mr. Landrum to attempt to put it in our own words.

The Court: That strikes me as being the proper way to do it. But I want to do it in a way that will preserve the rights of the litigants and at the same time give to the reviewing court just what has been done.

Mr. John M. Martin: I shall present no order unless directed by the Court specifically so to do.

Mr. Landrum: Does your Honor wish me to present one?

The Court: Do you desire to?

Mr. Landrum: No, I would prefer not to.

The Court: I think not. The only thought I had was whether the Court of Appeals would consider the transcript of this record. If it will, I will be glad to have them do so, because it is precisely as I desire to state it.

Mr. John M. Martin: I think that is the better way to do it. I prefer and will send the entire record up as a part of the appeal record and file a copy so Government counsel will have a copy.

Mr. Landrum: May the record show that the Government object to any such procedure as that, your Honor. [36]

The Court: The Government will object to their transmitting that record.

Mr. Landrum: Yes.

The Court: Are you going to object to it on any other ground than the jurisdictional ground that you have urged heretofore?

Mr. Landrum: On the ground the Court is without jurisdiction. This matter is already up on appeal. The record has been set and made.



The Court: That is the only ground?

Mr. Landrum: Yes, your Honor.

The Court: I ruled on that.

You are authorized to have this record prepared, and, so far as this Court is concerned, to transmit it to the Circuit Court of Appeals or any other appropriate agency, judicial or otherwise.

Mr. John M. Martin: Miss Reporter, will you make an original and four carbons for me?

The Reporter: Yes, sir.

(Whereupon, at 12:20 o'clock p. m., December 2, 1947, the hearing in the above-entitled matter was closed.)

[Endorsed]: Filed Dec. 8, 1947. Edmund L. Smith, Clerk. [37]

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[Endorsed]: No. 11820. United States Circuit Court of Appeals for the Ninth Circuit. Tavares Construction Company, Inc., a corporation, Concrete Ship Contractors, a joint venture, Stroud-Seabrook, a copartnership, Lloyd S. Stroud, R. S. Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page and Don F. Gates, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Southern Division.

Filed December 23, 1947.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for  
the Ninth Circuit

United States Circuit Court of Appeals  
Ninth Circuit

No. 11820

TAVARES CONSTRUCTION COMPANY, INC., a corporation, CONCRETE SHIP CONSTRUCTORS, a joint venture, STROUD-SEABROOK, a copartnership, L. S. STROUD, R. S. SEABROOK, C. M. ELLIOTT, CARLOS TAVARES, HENRY M. PAGE and DON F. GATES,

Appellants

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION BY APPELLANTS FOR EXTENSION  
OF TIME TO FILE THE RECORD AND  
DOCKET THE APPEAL

The above named Appellants respectfully petition the above entitled Court for an extension of time to file the Record and Docket the Appeal in the above entitled matter upon the following grounds:

1. That on August 26, 1947 Appellants filed their and the first Notice of Appeal to the above entitled Court from the Judgment in the action entitled "United States of America, Plaintiff, vs. Certain Parcels of Land in the City of National City, County of San Diego, State of California; Tavares Construction Company, Inc., et al., Defendants," No. 248-SD Civil in the District Court of the United States, Southern District of California, Southern Division.

2. That the District Court has heretofore, pursuant to stipulation of the parties extended the time for filing the record and docketing the Appeal for the full time permitted by Rule 73(g) of the Federal Rules of Civil Procedure, which time expires on November 24, 1947.

3. That there is now pending before the District Court a Motion to Correct and Modify the Record and Judgment, which Motion is now set for hearing on December 2, 1947.

4. That it is necessary and appropriate that the time for filing the record and docketing the Appeal be extended sufficient time to enable the District Court to act upon said Motion and to enable the Clerk to thereafter prepare and transmit the record with such corrections as may be ordered to the Appellate Court.

Wherefore, Appellants pray that the Court make and enter an Order extending the time for the filing of the record and docketing the Appeal to and including December 24, 1947.

Dated this 20th day of November, 1947.

JOHN M. MARTIN and  
FRANK L. MARTIN, JR.

By Frank L. Martin, Jr.

Attorneys for Appellants

[Verified.]

ORDER

Pursuant to the above and foregoing petition, and good cause appearing therefor:

It Is Hereby Ordered that pursuant to Rule 13 of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit, the time for filing the record and docketing the Appeal in the above entitled cause is hereby extended to and including December 24, 1947.

Dated this 20th day of November, 1947.

ALBERT LEE STEPHENS

Judge of the United States Circuit Court of Appeals,  
Ninth Circuit.

[Endorsed]: Filed Nov. 21, 1947. Paul P. O'Brien,  
Clerk.

---

[Title of Circuit Court of Appeals and Cause]

APPELLANTS' STATEMENT OF POINTS ON  
WHICH THEY INTEND TO RELY ON AP-  
PEAL

Come now the Appellants and, pursuant to Rule 19 of the above entitled Court, state the points on which they intend to rely on their appeal, as follows:

1. The District Court erred in instructing the jury that if the jury found that Appellants' lease could not have been sold, then their verdict will be zero.

2. The District Court erred in failing to instruct the jury that it should assume that Appellants' lease could be sold.



3. The District Court erred in instructing the jury that the amount of their verdict for Appellants should be the amount that the Appellants' lease could have been sold for on the open market for cash on December 23, 1944, or shortly thereafter, above what Appellants would have to have paid under all its terms and conditions.

4. The District Court erred in instructing the jury that Appellants' lease had been cancelled by this proceeding.

5. The District Court erred in instructing the jury that if the jury found that the interest of Appellants under their lease was so speculative and conjectural that no purchaser in the open market would have purchased the same except for a nominal consideration, that then their verdict as to Appellants must be in a nominal figure only.

6. The District Court erred in failing to interpret for the jury Appellants' lease, and further erred in failing to instruct the jury as to the legal rights of the lessor and lessee thereunder as interpreted by the Court.

7. The District Court erred in failing to instruct the jury that the interpretation of Appellants' lease as testified to by Appellee's witnesses was erroneous.

8. The District Court erred in finding and holding that the measure of just compensation for the taking of Appellants' lease was limited to the market value thereof and wholly dependent upon whether such lease could be sold.

9. The District Court erred in excluding evidence as to the taking being a breach of contract by Appellee.

10. The District Court erred in excluding evidence as to the right which Appellants would have had to sue in

the United States Court of Claims for breach of contract and as to the value of such right, had Appellee, instead of filing the Amended Declaration of Taking and its Amended and Supplemental Complaint, merely refused on December 23, 1944 to further perform its obligations under Appellants' lease with Appellee.

11. The District Court erred in holding that it was without power to determine in this proceeding the amount of just compensation which Appellants were entitled to recover for the taking, cancellation or frustration of Appellants' option rights contained in Appellants' lease by reason of the condemnation of Appellants' lease.

12. The District Court erred in failing to instruct the jury that Appellants were entitled to recover as just compensation in this action for the taking of Appellants' option rights the difference between the option price of the shipyard site, facilities and machinery, and the reasonable value of the shipyard site, facilities and machinery as of December 23, 1944.

13. The District Court erred in admitting in evidence correspondence between Appellants and Appellee as to Appellants' offer of compromise.

14. The evidence is insufficient to justify the verdict of zero and the judgment of nothing.

15. The verdict of zero and judgment of nothing are contrary to the evidence.

16. The verdict of zero and judgment of nothing do not constitute compensation and are against law.

17. The verdict and judgment as to Appellants are a miscarriage of justice and the taking of private property without just compensation.

18. The District Court erred in denying Appellants' Motion for a New Trial.

Dated this 16th day of December, 1947.

JOHN M. MARTIN and  
FRANK L. MARTIN, JR.

By Frank L. Martin, Jr.

Attorneys for Appellants

Copy received, Dec. 17th, 1947. Joseph F. Mc Pherson,  
Spec. Asst. to Atty. Gen.

[Endorsed]: Filed Dec. 23, 1947. Paul P. O'Brien,  
Clerk.

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[Title of Circuit Court of Appeals and Cause]

APPELLANTS' PETITION FOR ORDER FOR CER-  
TAIN EXHIBITS TO BE CONSIDERED IN  
ORIGINAL FORM AS PART OF APPEAL

Appellants respectfully petition the above entitled Court for an Order that the following exhibits will be considered in their original form as a part of the record on appeal without the necessity of incorporating them in the printed record:

1. The following exhibits which pertain primarily to the issues as to defendants other than appellants and probably not necessary for the determination of this Appeal, but which should be considered as a part of the

record on appeal in order that the complete record may be before the Court:

(a) Plaintiff's Exhibit No. 1 and Defendants' Exhibits D, E, F, K and N, being large maps of the parcels and area.

(Exhibit S, being a large map showing the shipyard as of the date of taking will be printed in the record.)

(b) Defendants' Exhibits A, B, C, L, M, X, Y and Z, being various leases and letters relating to interests of defendants other than appellants.

2. The following exhibits which are photographs are not of sufficient importance other than to give the Court a view of various portions of the shipyard, and which can be better viewed from the originals:

Defendants' Exhibits G, H, I, J, O, P, T and U.

(Exhibit J is a large panorama view and would be very difficult of reproduction.

Exhibit V, being an airview photograph of the shipyard will be printed in the record.)

3. Defendants' Exhibit R, being a large model of the Shipyard, is impossible of reproduction in the printed record. (Exhibit S, which is a large map depicting everything shown on the Model, will be printed in the record.)

Appellants believe that because of the nature of the aforesaid exhibits and the limited use thereof on the appeal that not only unnecessary encumbering of the printed record can be avoided by the granting of this petition but that such use as the Court may desire to make of such exhibits can be better afforded by examining the originals in most instances.



Wherefore, Appellants pray that this petition be granted and for an Order of the Court that Plaintiff's Exhibit 1 and Defendants' Exhibits A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, R, T, U, V, X, Y, and Z be considered as a part of the record on appeal without the necessity of incorporating them in the printed record.

Respectfully submitted,

JOHN M. MARTIN and  
FRANK L. MARTIN, JR.

By John M. Martin  
Attorneys for Appellants

[Verified.]

Received copy this 17th of December, 1947. Joseph F. McPherson, Spec. Asst. to Atty. Gen.

### ORDER

Pursuant to the above and foregoing Petition and good cause appearing therefor:

It Is Hereby Ordered that Plaintiff's Exhibit 1 and Defendants' Exhibits A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, R, T, U, V, X, Y and Z be considered as a part of the record on appeal in their original form without the necessity of incorporating them in the printed record.

Dated this 29th day of December, 1947.

FRANCIS A. GARRECHT  
Judge of the United States Circuit Court of Appeals,  
Ninth Circuit.

[Endorsed]: Filed Dec. 29, 1947. Paul P. O'Brien,  
Clerk.

[Title of Circuit Court of Appeals and Cause]

ORDER THAT EXHIBITS "S" AND "V" NEED  
NOT BE PRINTED WITHIN PRINTED TRAN-  
SCRIPT

Good cause therefor appearing, It Is Ordered that Exhibits "S" and "V", being a large aerial photograph and a large photostatic map, need not be reproduced in the printed transcript of record, but will be considered by the Court in their original form.

FRANCIS A. GARRECHT

Senior United States Circuit Judge

Dated: San Francisco, Calif., January 13, 1948.

[Endorsed]: Filed Jan. 13, 1948. Paul P. O'Brien,  
Clerk.



**No. 11820**

**IN THE**

**United States Circuit Court of Appeals**

**FOR THE NINTH CIRCUIT**

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**UNITED STATES OF AMERICA,**

**Appellant,**

**vs.**

**TAVARES CONSTRUCTION COMPANY, INC., a  
corporation, CONCRETE SHIP CONSTRUCTORS,  
a joint venture, STROUD-SEABROOK, a copartner-  
ship, LLOYD S. STROUD, R. S. SEABROOK, C.  
M. ELLIOTT, CARLOS TAVARES, HENRY M.  
PAGE and DON F. GATES,**

**Appellees.**

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**VOLUME V.**

**SUPPLEMENTAL TRANSCRIPT  
OF RECORD**

**(Pages 1458 to 1466, Inclusive)**

**Upon Appeal From the District Court of the United States  
for the Southern District of California  
Southern Division**

---

**FILED**

**MAY 21 1946**

**PAUL F. O'BRIEN,**

**CLERK**





**No. 11820**

**IN THE**

**United States Circuit Court of Appeals**  
**FOR THE NINTH CIRCUIT**

---

**UNITED STATES OF AMERICA,**

**Appellant,**

**vs.**

**TAVARES CONSTRUCTION COMPANY, INC., a  
corporation, CONCRETE SHIP CONSTRUCTORS,  
a joint venture, STROUD-SEABROOK, a copartner-  
ship, LLOYD S. STROUD, R. S. SEABROOK, C.  
M. ELLIOTT, CARLOS TAVARES, HENRY M.  
PAGE and DON F. GATES,**

**Appellees.**

---

**VOLUME V.**

**SUPPLEMENTAL TRANSCRIPT  
OF RECORD**

**(Pages 1458 to 1466, Inclusive)**

**Upon Appeal From the District Court of the United States  
for the Southern District of California  
Southern Division**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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[Minutes: Tuesday December 2, 1947]

Present: The Honorable Paul J. McCormick, District Judge.

For hearing motion of defendants Tavares Construction Co., Inc., et al., to correct and modify record and judgment; C. U. Landrum, Esq., Spec. Asst. to Att'y General, present for Gov't; John M. Martin and Frank L. Martin, Esqs., present for moving defendants;

Attorney John Martin argues in support of motion and Attorney Landrum argues in reply and in opposition to motion. Court makes a statement and notes correction in transcript of Feb. 20, 1947 (page 435, line 3).

At 11:23 A. M. Attorney John Martin argues further in support of motion in closing. Court makes a statement and reads from transcripts and record.

Court gives oral opinion and enters order that certain words are hereby stricken from judgment upon verdict entered June 7, 1947, in accordance with said opinion.

Attorney Landrum excepts to Court's ruling.

Attorney John Martin moves that transcript be made of these proceedings embodying Court's ruling, to be included in record on appeal, without necessity of preparing written order thereon, and it is so ordered over the objection of Attorney Landrum. [1\*]

1460 *Tavares Construction Company, Inc., et al.*

In the District Court of the United States  
Southern District of California  
Southern Division

No. 248-SD Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CERTAIN PARCELS OF LAND IN THE CITY OF  
NATIONAL CITY, County of San Diego, State of  
California; TAVARES CONSTRUCTION COM-  
PANY, INC., etc., et al.,

Defendants.

#### NOTICE OF APPEAL

FROM ORDER OF COURT OF DECEMBER 2, 1947,  
MADE UPON PROCEEDINGS BROUGHT TO  
CORRECT AND MODIFY JUDGMENT AND  
FROM ORDER OF COURT MODIFYING JUDG-  
MENT.

Notice Is Hereby Given that plaintiff, United States of America, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the order of the United States District Court made and entered in the above entitled action on December 2, 1947, upon proceedings brought by defendants and appellants Tavares Construction Company, Inc., a corporation, Concrete Ship Constructors, a joint venture, Stroud-Seabrook, a copartnership, L. S. Stroud, R. S. Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page and Don F. Gates, to correct and modify record and judgment, and from order of United States District Court of December 2, 1947, modifying the judgment theretofore made and entered herein.

Dated: March 1, 1948.

JAMES M. CARTER

United States Attorney

C. U. LANDRUM,

JOSEPH F. McPHERSON and

FRANCIS C. WHELAN

Special Assistants to the Attorney General

By Francis C. Whelan

Attorneys for Plaintiff

[Endorsed]: Filed; mld. copy to John M. Martin,  
Atty. for Defts., Mar. 1, 1948. Edmund L. Smith,  
Clerk. [2]

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[Title of District Court and Cause]

CERTIFICATE OF CLERK TO SUPPLEMENTAL  
RECORD

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 4, inclusive, contain full, true and correct copies of Minute Order Entered December 2, 1947; Notice of Appeal From Order of Court of December 2, 1947, made upon proceedings brought to correct and modify judgment and from order of court modifying judgment and Supplemental Designation of Plaintiff and Appellee and Cross-Appellant United States of America of Record on Appeal which constitute the supplemental transcript of record on appeals to the United States Circuit Court of Appeals for the Ninth Circuit.



1462 *Tavares Construction Company, Inc., et al.*

Witness my hand and the seal of said District Court  
this 17 day of March, A. D. 1948.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke

Chief Deputy

---

[Endorsed]: No. 11820. United States Circuit Court  
of Appeals for the Ninth Circuit. United States of  
America, Appellant, vs. Tavares Construction Company,  
Inc., a corporation, Concrete Ship Constructors, a joint  
venture, Stroud-Seabrook, a copartnership, Lloyd S.  
Stroud, R. S. Seabrook, C. M. Elliott, Carlos Tavares,  
Henry M. Page and Don F. Gates, Appellees. Supple-  
mental Transcript of Record. Upon Appeal From the  
District Court of the United States for the Southern  
District of California, Southern Division.

Filed March 18, 1948.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for  
the Ninth Circuit

United States Circuit Court of Appeals  
Ninth Circuit

No. 11820 Civil

TAVARES CONSTRUCTION COMPANY, INC., a corporation, CONCRETE SHIP CONSTRUCTORS, a joint venture, STROUD-SEABROOK, a copartnership, L. S. STROUD, R. S. SEABROOK, C. M. ELLIOTT, CARLOS TAVARES, HENRY M. PAGE and DON F. GATES,

Appellants and Cross-Appellees,

vs.

UNITED STATES OF AMERICA,

Appellee and Cross-Appellant.

STIPULATION THAT APPEALS MAY BE CONSOLIDATED FOR PURPOSES OF RECORD, BRIEFING, HEARING AND SUBMISSION

It is hereby stipulated by and between appellants and cross-appellees Tavares Construction Company, Inc., a corporation, Concrete Ship Constructors, a joint venture, Stroud-Seabrook, a copartnership, L. S. Stroud, R. S. Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page and Don F. Gates, appearing through their counsel of record, John M. Martin and Frank L. Martin, Jr., and appellee and cross-appellant, United States of America, appearing through its attorneys of record, James M. Carter, United States Attorney, C. U. Landrum, and Francis C. Whelan, Special Assistants to the Attorney General, that the Appeal of Tavares Construction Company, Inc., a corporation, Concrete Ship Constructors, a joint venture, Stroud-Seabrook, a copartnership, L. S. Stroud, R. S. Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page

and Don F. Gates heretofore docketed in the above entitled Court as No. 11820, and the Cross-Appeal of appellee and cross-appellant, United States of America from the Order of Court of December 2, 1947, made upon proceedings brought to correct and modify Judgment, and from the Order of Court of December 2, 1947 modifying Judgment, notice of which said Cross-Appeal was filed in the office of the Clerk of the United States District Court in and for the Southern District of California, on March 1, 1948, and which said Cross-Appeal has heretofore been docketed in the above entitled Circuit Court of Appeals for the Ninth Circuit, may be consolidated for purposes of record on appeal, briefing purposes, hearing and submission.

Dated: This 6th day of April, 1948.

JAMES M. CARTER

United States Attorney

C. U. LANDRUM

FRANCIS C. WHELAN

Special Assistants to the Attorney General

By Francis C. Whelan

Attorneys for Appellee and Cross-Appellant, United States  
of America

JOHN M. MARTIN and

FRANK L. MARTIN, JR.

By Frank L. Martin, Jr.

Attorneys for Appellants and Cross-Appellees Tavares  
Construction Company, Inc., a corporation, Concrete  
Ship Constructors, a joint venture, Stroud-Seabrook,  
a copartnership, L. S. Stroud, R. S. Seabrook, C. M.  
Elliott, Carlos Tavares, Henry M. Page and Don F.  
Gates

Receipt of a copy of the foregoing Stipulation is hereby acknowledged on this 6th day of April, 1948. John M. Martin and Frank L. Martin, Jr., by Frank L. Martin, Jr., Attorneys for Appellants and Cross-Appellees Tavares Construction Company, Inc., a corporation, et al.

[Endorsed]: Filed April 7, 1948. Paul P. O'Brien, Clerk.

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[Title of Circuit Court of Appeals and Cause]

ORDER CONSOLIDATING APPEALS FOR PURPOSES OF RECORD ON APPEAL, BRIEFING PURPOSES, HEARING AND SUBMISSION

Good cause therefor appear, It Is Ordered that the appeal of appellants and cross-appellees Tavares Construction Company, Inc., a corporation, Concrete Ship Constructors, a joint venture, Stroud-Seabrook, copartnership, L. S. Stroud, R. S. Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page and Don Gates, and the cross-appeal of appellee and cross-appellant United States of America be, and the same are, consolidated for purposes of record on appeal, briefing purposes, hearing and submission.

FRANCIS A. GARRECHT

Senior United States Circuit Judge

Dated: San Francisco, Calif., April 7, 1948.

[Endorsed]: Filed April 7, 1948. Paul P. O'Brien, Clerk.



[Title of Circuit Court of Appeals and Cause]

STATEMENT OF CROSS-APPELLANT UNITED  
STATES OF AMERICA OF POINTS ON  
WHICH IT INTENDS TO RELY ON CROSS-  
APPEAL

Comes now Appellee and Cross-Appellant, United States of America, and pursuant to Rule 19 of the above entitled Court, states the points on which it intends to rely on its Cross-Appeal, as follows:

1. The District Court erred in making its order of December 2, 1947.
2. The District Court lacked jurisdiction to amend the Judgment entered June 6, 1947.
3. The District Court erred in concluding that the questions as to compensation for the option had not been considered or decided at the trial of the case.
4. The District Court erred in granting the motion of November 17, 1947, to correct and modify the record and Judgment.
5. The District Court erred in holding that the verdict did not include compensation for the option.

Dated: This 7th day of April, 1948.

A. DEVITT VANECH

Assistant Attorney General

JAMES M. CARTER

United States Attorney

FRANCIS C. WHELAN

C. U. LANDRUM

Special Assistants to the Attorney General

By Francis C. Whelan

Attorneys for Appellee and Cross-Appellant, United States  
of America

[Endorsed]: Filed Apr. 9, 1948. Paul P. O'Brien,  
Clerk.

No. 11820.

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

---

TAVARES CONSTRUCTION COMPANY, INC., a corporation,  
CONCRETE SHIP CONSTRUCTORS, a joint venture,  
STROUD-SEABROOK, a copartnership, LLOYD S. STROUD,  
R. S. SEABROOK, C. M. ELLIOTT, CARLOS TAVARES,  
HENRY M. PAGE and DON F. GATES,

*Appellants and Cross-Appellees,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee and Cross-Appellant.*

---

## BRIEF OF APPELLANTS.

---

JOHN M. MARTIN,  
FRANK L. MARTIN, JR.,

714 West Olympic Boulevard, Los Angeles 15,  
*Attorneys for Appellants and Cross-Appellees.*



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No. 11820.

IN THE

**United States Circuit Court of Appeals**  
**FOR THE NINTH CIRCUIT**

---

TAVARES CONSTRUCTION COMPANY, INC., a corporation,  
CONCRETE SHIP CONSTRUCTORS, a joint venture,  
STROUD-SEABROOK, a copartnership, LLOYD S. STROUD,  
R. S. SEABROOK, C. M. ELLIOTT, CARLOS TAVARES,  
HENRY M. PAGE and DON F. GATES,

*Appellants and Cross-Appellees,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee and Cross-Appellant.*

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**BRIEF OF APPELLANTS.**

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**Jurisdictional Statement.**

This is an appeal by certain defendants from those portions of the final judgment entered on June 6, 1947, by the District Court of the United States for the Southern District of California, Southern Division, in an action in eminent domain, adjudicating issues between the plaintiff and said defendants and from the order denying the motion of said defendants for a new trial entered in this action on July 29, 1947.

The action was brought by the Appellee at the request of the United States Maritime Commission under the authority of and pursuant to the provisions of the Act of Congress approved August 25, 1941 (Public Law No. 247—77th Congress), the Act of Congress approved March 5, 1942 (Public Law No. 474—77th Congress), the Merchant Marine Act of 1936, as amended, the Act of Congress approved August 1, 1888 (25 Stat. 357, 40 U. S. C., Sec. 257, 258), the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U. S. C., Sec. 258a), the Act of Congress approved March 27, 1942 (Public Law No. 507—77th Congress), being the Second War Powers Act of 1942 (50 U. S. C. Append., Sec. 632), and Acts amendatory thereof and supplementary thereto, to acquire property for the construction of facilities to be used in the construction and repair of ships and the operation of such facilities. [T. pp. 6 and 251.]

This appeal from the final judgment and from the denial of the defendant's motion for a new trial is taken pursuant to the provisions of 28 U. S. C. A., Sec. 225, which provides that:

“(a) The Circuit Court of Appeals shall have appellate jurisdiction to review by appeal or writ of error, final decisions—

First. In the District Courts, in all cases, save where a direct review of the decision may be had in the Supreme Court under Sec. 345 of this title ”

### Statement of the Case.

The appellants are members of the joint venture known as Concrete Ship Constructors which was formed for the purpose of constructing concrete barges for the United States Maritime Commission. On November 27, 1941 this joint venture entered into a contract [T. p. 97] with the Maritime Commission wherein they agreed to construct such barges for the Maritime Commission and the latter agreed to pay for them. After the execution of this agreement, the Tavares Construction Company for and on behalf of the joint venture, entered into an Agreement of Lease [T. p. 49] on December 27, 1941 with the Defense Plant Corporation. Basically this lease provided that the Tavares Construction Company would design and construct for the Defense Plant Corporation, a shipyard; that the Defense Plant Corporation would defray the cost of the site, facilities and machinery; and that the shipyard upon completion would be leased to the Tavares Construction Company. The Company was to be paid nothing for its services in designing and supervising the construction other than being given an option to purchase the site, facilities and machinery of the shipyard upon the expiration or termination of the Agreement of Lease [Tr. p. 299—Stipulation 29]. The option to purchase was given by Clause 15 of the Agreement of Lease, which provided that upon the expiration of the lease or upon its termination in accordance with Clause 12 of the lease, the Tavares Construction Company was to have for ninety



days the right to purchase the site, facilities and machinery of the shipyard at the higher of two option prices, calculated according to certain formulae prescribed by the lease [T. p. 58]. Moreover in case the company declined to buy at the option price it was given the right for an additional ninety days to purchase the property or any portion thereof, at a price equal to the best offer received by the Defense Plant Corporation during that period [T. p. 60]. The Agreement of Lease also provided that the company was to pay rental in the amount of \$83,327.00 per boat delivered to the Government, but that when total rental paid by the company equaled the total outlay of the Defense Plant Corporation under the Agreement, plus interest thereon, the company was no longer obligated to pay rental.

Thereafter additional contracts for ships were entered into between Concrete Ships Constructors and the Maritime Commission [T. pp. 136, 186, 234].

To the original Agreement of Lease there were added six amendments [T. p. 68] which successively raised the amount of rental to be paid by the company and also the total sums which the Defense Plant Corporation obligated itself to expend upon the shipyard.

On October 5, 1944 the total rentals paid by the company amounted to \$2,775,807.01, the total sum expended by the Defense Plant Corporation plus interest thereon, so that the lease relieved the company from any further liability to pay rental for the use of the yard [T. p. 693].

On November 10, 1942, the Government commenced this eminent domain proceeding by filing its Complaint in Condemnation [T. p. 3], for the purpose of acquiring title to the shipyard site for the use by Tavares Construction Company in its shipbuilding construction for the Maritime Commission [T. p. 20]. One day later, November 11, 1942 the Defense Plant Corporation and the Tavares Construction Company entered into an Agreement Amending Agreement of Lease [T. p. 86]. This amendment in express words recognized the fact that the Government was proceeding to acquire title to the land to be used as the site [T. p. 87] and that if the Tavares Construction Company should thereafter exercise its purchase option, the company would have to pay to the Government the cost to it of the site acquired by condemnation.

Thereafter on September 23, 1944 the Government filed an amendment to its Complaint in Condemnation, adding an additional parcel (Parcel A) for the shipyard site [T. p. 24]; on October 3, 1944, its original Declaration of Taking [T. p. 28]; on January 15, 1945, its Supplemental and Amended Complaint in Condemnation [T. p. 249]; and on December 23, 1944 its Amended Declaration of Taking [T. p. 42]. This last date has been stipulated as the date of taking of the interests involved in this appeal [T. p. 401].

Appellants thereupon filed a Motion for a Bill of Particulars [T. p. 259] and this motion was granted [T. p. 265]. The Government then filed a Bill of Particulars

which indicated the intention of the Government to acquire the fee simple title to all the lands in question and to acquire absolute ownership of all improvements and facilities located thereon [T. p. 266].

On January 1, 1946 all of the property was transferred by Defense Plant Corporation to the Navy Department [T. p. 289]. Thereafter on September 5, 1946 the Navy notified the Tavares Construction Company that the Navy Department elected to terminate the Agreement of Lease [Plancor 407] and any extensions thereof [T. p. 294]. Upon receipt of this notice the Tavares Construction Company made written demand upon the Navy Department, the Maritime Commission, and the Reconstruction Finance Corporation as successor to the Defense Plant Corporation that it be advised of the exact amounts of the two option prices so that it might elect whether or not to exercise its purchase option [T. p. 296]. The Navy, however, proceeded to physically destroy approximately one-third of the facilities [Tr. pp. 299, 300] without appellants' consent [T. p. 298] and over their protest [T. p. 292].

Upon pre-trial, an order was entered determining the following:

“(1) That the lease and option rights of Tavares Construction Company, Inc. granted under the ‘Agreement of Lease,’ dated December 27, 1941, and by the supplements thereto, have been taken and condemned by this action.

(2) That the defendants Tavares Construction Company, Inc. have a compensable interest in the property taken by this proceeding.”

In the trial below the appellants claimed that their rights under the Agreement of Lease, including the option to purchase constituted property taken by the Government and that that property had value for which the Government had to make reimbursement. These claims were challenged by the Government. After both sides had presented their evidence, the matter was submitted to the jury under instructions which amounted to a directed verdict, and the jury returned a verdict that the appellants were entitled to nothing [T. p. 1304]. Judgment was entered on this verdict [T. p. 311].

Thereafter appellants' Motion for a New Trial was denied [T. p. 366]. Appellants' Motion to Correct and Modify Record and Judgment [T. p. 381] was granted and the trial judge struck the word “option” from the judgment previously signed by him in error [T. pp. 1437-1441].

Appellants have appealed from the final judgment and from the denial of their Motion for a New Trial [T. p. 367]. Appellees, by cross-appeal, have appealed from the granting of appellants' Motion to Correct and Modify Record and Judgment. By order of this Court the two appeals have been consolidated for purposes of record on appeal, briefing purposes, hearing and submission.



### Specifications of Error.

1. The trial court was in error in holding that the extinguishment of the purchase option of the Tavares Construction Company was not an item compensable in an eminent domain proceedings.
2. The trial court was in error in its instructions to the jury concerning the proper measure of compensation to be paid to the Tavares Construction Company.
3. The trial court was in error in admitting into evidence an offer of compromise made by the Tavares Construction Company.
4. The inflammatory character of the final argument of Government counsel was prejudicial error.
5. The trial court was in error in not instructing the jury as to the legal significance of the Agreement of Lease and its Amendments.
6. The evidence is insufficient to support the verdict and judgment.
7. The verdict and judgment are against law.

## Summary of Argument.

The Tavares Construction Company was a lessee with a purchase option of the site, facilities and machinery of a shipyard at the time of the condemnation by the Government of all interests other than its own in that shipyard. The Company's contractual rights under the lease were "property" within the contemplation of the Fifth Amendment so that those rights were compensable items in an eminent domain proceeding.

By its own words, the lease or any rights thereunder could neither be sold, assigned nor pledged without the consent of the Defense Plant Corporation and the approval of the Maritime Commission. The lease was hence not a marketable item, and the trial court was in error in charging that "market value" of the lease was the proper measure of just compensation to be paid the Company. The correct measure was the difference between the value of the properties and the Company's option price as of the date of taking.

The lease was a complex legal document which the court should have interpreted for the jury rather than permitting that body to make its own unaided construction of that lease on the basis of non-expert testimony as to its legal import. The court was moreover in error in admitting into evidence an offer of compromise made by appellants prior to trial of the proceedings. In addition, the final argument by the Government counsel was of a prejudicial and inflammatory character, requiring the reversal and remand of these proceedings for a new trial.

The evidence is insufficient to support the verdict and judgment. The judgment of nothing does not constitute compensation.

## ARGUMENT.

### I.

**The Trial Court Was in Error in Holding That It Was Without Power to Award Compensation to the Tavares Construction Company for the Extinguishment of the Purchase Option in the Agreement of Lease Between the Defense Plant Corporation and the Tavares Construction Company.**

(The appellants in this action are all members of a joint venture known as Concrete Ship Constructors. Throughout the trial of the action, however, the interests of appellants were almost without exception referred to as the interests of the Tavares Construction Company. For the sake of uniformity we shall therefore retain that designation in this brief and refer to appellants as the Tavares Construction Company.)

The Bill of Particulars [T. p. 266] to the Amended and Supplemental Complaint in Condemnation of the United States [T. p. 249] expressed the Government's plain intention to take "the right, title, interest or estate, if any, in or to said lands and all improvements and fixtures located thereon, or in any way appertaining thereto, owned, held, or claimed by" the Tavares Construction Company. It must be conceded that the Government intended thereby to condemn all interests in the lands, improvements, and fixtures which the Tavares Construction Company acquired by reason of its Agreement of Lease [T. p. 49] and amendments thereto with the Defense Plant Corporation. One of those interests was a purchase option [T. p. 58], and it is manifest that that purchase option was extinguished or "taken" by the condemnation, for

once the property became the property of the United States the Tavares Construction Company could not thereafter have defeated the very purpose of the condemnation by exercising its option.

That this was Judge Yankwich's opinion upon pre-trial is evidenced by his Order upon Pre-trial [T. p. 310] which determined:

"(1) That the lease and option rights of Tavares Construction Company, Inc., granted under the 'Agreement of Lease,' dated December 27, 1941, and by the supplements thereto, have been taken and condemned by this action."

Notwithstanding the fact that the condemnation proceedings manifestly divested the Tavares Construction Company of this option, the trial court indicated throughout the trial of these proceedings below that it was of the conviction that a United States District Court was not the proper forum to award the Tavares Construction Company compensation for that taking. For example the court during the trial below said:

"When it comes to the question of value of the option, it seems to me that the case can be simplified by the optionee preserving in the Court of Claims anything subsequent to the date of the termination of the project." [T. p. 725.]

. . . . .

"Anything that comes within the period up to December 23, 1944, is a relevant matter to this case. Anything that occurred subsequent to that is not relevant in this case. I am not saying that there may not arise in some other forum a claim for structure [*sic.*] breaches, etc., for damages of that kind." [T.



p. 725.] [Note: The word “structure” was corrected by the court to “frustration” T. p. 1425.]

. . . . .

“I have been trying, as far as we can, to keep this case separate and apart from any additional claims that the defendants may have against the Government, which is litigable in the Court of Claims, and we will do that by adhering to that deadline of December 23, 1944. Anything that occurred subsequent to that is irrelevant to this issue unless the defendants bring it in themselves, and, if they do, then you have a right to respond to it.” [T. p. 727.]

During another conference [T. p. 701], the court ruled that counsel for appellants could not discuss at any time before the jury the right of appellants to sue in the Court of Claims, clearly indicating by that ruling that the right to sue in the Court of Claims was deemed by the court to be a separate right not extinguished by the condemnation and hence not a factor to be considered in determining just compensation for that which had been taken.

In the hearing of appellants’ Motion to Correct and Modify Record and Judgment [T. p. 1418] the court indicated that at no time during the trial of the proceedings did it conceive the “frustration” of the purchase option to be an item compensable in an action of eminent domain [T. p. 1440], and in conformity with its intention during the trial to eliminate that “frustration” as a compensable item, the court corrected the judgment [T.pp. 1436-1447], which it had previously signed in error, by striking the word “option.” This was done in conformity with decision of the trial court that it was without power in this proceeding to determine just compensation for the taking of the option [T. p. 1437].

We submit however, that the trial court was in error in the opinion entertained by it during the trial that the purchase option was not a compensable item in an eminent domain proceeding. After a hearing upon that precise issue at pre-trial Judge Yankwich had already determined [T. p. 310]:

“(2) That the defendant Tavares Construction Company, Inc., has a compensable interest in the property taken by this proceeding.”

We submit that it was error for the trial not to have been conducted in accordance with this ruling upon the pre-trial.

Amendment V to the Constitution of the United States in so far as it is here relevant provides as follows:

“. . . ; nor shall private property be taken for public use, without just compensation.”

These words of the Fifth Amendment are so explicit that no serious challenge can be made to their requirement of “just compensation.” Indeed, it has been held that its mandate is as applicable in war as in peace.

*United States v. New River Collieries Company*  
(1923), 262 U. S. 341, 67 L. Ed. 1014, 43 S. Ct. 565.

Even the exercise by Congress of such delegated powers as the regulation of interstate commerce is subject to the Fifth Amendment requirement of just compensation.

*U. S. v. Chicago, Milwaukee, St. Paul and P. Ry. Co.* (1931), 282 U. S. 311, 75 L. Ed. 359, 51 S. Ct. 159.

It is therefore clear in the case at bar that if the rights of the Tavares Construction Company taken by the Gov-

ernment were "private property" within the contemplation of the Fifth Amendment, the Government cannot avoid its obligation to pay just compensation for the taking.

Before determining whether those rights *are* "private property," one must first determine the exact nature of the rights which were acquired by the Tavares Construction Company under the Agreement of Lease in question [T. p. 49] and its six amendments [T. p. 68].

The Agreement of Lease, or Plancor 407, or Exhibit "W," as it was variously referred to [T. p. 49], was a lengthy agreement entered into by the Defense Plant Corporation and the Tavares Construction Company whereby the Tavares Construction Company, as Lessee, covenanted to design and construct a yard [T. p. 51] for the building of concrete barges for the Government, and the Defense Plant Corporation, as Lessor, covenanted to defray the cost of that construction so long as it did not exceed the sum of \$404,500.00 [T. p. 54]. Title to the facilities and machinery was reserved in the Defense Plant Corporation [T. p. 54] but the site, facilities and machinery were leased to the Tavares Construction Company [T. p. 54], the latter agreeing to pay rental to the Defense Plant Corporation in the sum of \$83,327.00 for each boat delivered by the Tavares Construction Company to the Government until the total of the rentals paid should equal the total sums expended by the Defense Plant Corporation under the agreement [T. p. 56].

To this original Agreement of Lease there were subsequently added amendments [T. p. 68 *et seq.*], which progressively raised the maximum costs of the construction to \$2,798,066.00 [T. p. 93] and the maximum rentals to be paid by the Tavares Construction Company per boat delivered to \$140,000.00 [T. p. 94].

In addition to the foregoing basic provisions, there were various other provisions which accorded privileges to one or the other of the parties to the agreement. These provisions will not be set out at length in this brief because of the limitations of space, but reference will be made to the individual clauses, which, we submit, gave to the Tavares Construction Company rights constituting "private property" within the meaning of the Fifth Amendment.

The first such provision was Clause 12 [T. p. 54] of the agreement which clearly effected a lease of the site, facilities and machinery in question to the Tavares Construction Company for a term ending December 31, 1949, subject only to prior termination by either party in case substantial use of the site, facilities and machinery was no longer required to enable the Tavares Construction Company to construct boats for the Government.

Clause 13 stipulated the rental to be paid to the Defense Plant Corporation by the Tavares Construction Company and provided further that the payment of such rentals would terminate when the total rental paid by the Tavares Construction Company, plus interest thereon, equalled the total outlay by the Defense Plant Corporation, plus interest thereon.

In short, Clause 12 and Clause 13, taken together, gave to the Tavares Construction Company a lease which extended to December 31, 1949, but the rentals of which terminated as soon as the Defense Plant Corporation had been reimbursed for its total expenditures.

As it turned out, the last payment of rent was made on October 5, 1944 [T. p. 693]. As of that date the Lessee had paid to the Lessor the sum of \$2,775,807.01 in rental, being the total outlay of the Defense Plant Corporation plus interest, so that the Tavares Construction Company



thereupon became entitled to the leasehold, rent free, for the remainder of the term. As of the stipulated date of taking, December 23, 1944 [T. p. 401], therefore, the Tavares Construction Company was entitled to over five years' free occupancy and use of the site, facilities and machinery in question unless the lease were sooner terminated by either of the parties.

In addition to the one ground for termination provided for by Clause 12, Clause 14 provided for four additional grounds [T. p. 57]. It is to be noted that of these four grounds for termination, one alone, (a), was beyond the power of the Tavares Construction Company to prevent. As regards the others, that company might have removed them as a ground for termination by simply complying with the request of the Defense Plant Corporation for priority, by complying with the terms and conditions of the agreement, by curing a past violation of a term or condition within thirty days of written notice of a violation, etc.

Clause 15 provided as follows:

“Upon the expiration or termination of this lease or extension thereof pursuant to paragraph Twelve hereof, or upon cancelation of this lease or extension thereof pursuant to Clause (a) of paragraph Fourteen hereof (unless such cancellation shall have been effected because of a violation by Lessee of the contracts referred to in said Clause (a)), Lessee shall have and is hereby granted, for a period of ninety (90) days after such termination, expiration or cancelation (hereinafter referred to as the ‘option period’) the right and option, by written notice to the Defense Corporation and to the Maritime Commission, to purchase all but not part of the Site, Facilities and Machinery at the following prices: . . .”

That clause then provided that the option price was to be the higher of two prices calculated according to certain stipulated formulae [T. p. 58]. As of December 23, 1944, the date of taking, the higher of these two calculated option prices was the sum of \$2,141,236.49 [T. p. 693 and Exhibit "Q," T. pp. 1305 to 1333], plus the cost of the land [T. p. 89]. Had the Tavares Construction Company been permitted to exercise its option as of that date, it could therefore have purchased all the facilities and machinery in question for that sum of \$2,141,236.49 and the land at the cost thereof to the Government. Moreover in the event that the Tavares Construction Company declined to purchase the shipyard at that price, Clause 15 gave to the Tavares Construction Company the right of "first refusal" for an additional ninety days to purchase all or any portion thereof.

Clause 26 provided that it was contemplated that the lease in question of the site, facilities and machinery might be transferred and conveyed to another branch of the Government but that upon such transfer, the Government acting through the Maritime Commission should succeed to all the rights, powers, privileges, discretion and obligations of the Defense Plant Corporation.

It is to be noted that the lease did not contemplate that such a transfer from the Defense Plant Corporation to another branch of the Government should extinguish all the rights of the Tavares Construction Company. On the contrary, the words "and, upon such transfer, the Government . . . shall succeed to all the . . . obligations of Defense Corporation hereunder . . ." indicates that there was contemplated merely a change in the identity of the Lessor under the lease—not a cancellation of that lease. Any rights therefore which the Tavares Construction Company might have had prior to such a transfer by

the Defense Plant Corporation to another branch of the Government, the Tavares Construction Company would have had subsequent to that transfer.

From this inspection of the basic agreement and its six amendments, it becomes apparent that as of December 23, 1944, the stipulated date of taking of the Tavares interests, the Tavares Construction Company (A) was lessee of a shipyard under a lease which, by its terms, ran until December 31, 1949, unless sooner terminated by either party, (B) was entitled to that leasehold rent free until December 31, 1949, unless the lease was sooner terminated by either party, (C) had an option to purchase the shipyard in the event of the termination of the lease at a calculable option price, and (D) had the right of "first refusal" for an additional ninety days in the event of its declining to purchase the shipyard at that option price.

Despite the efforts of the Government and its expert witnesses to derogate the rights of the Tavares Construction Company under the Lease Agreement, the instrument speaks for itself, and we submit that it states in unambiguous language that the Tavares Construction Company had an option to purchase the site, facilities and machinery upon the termination of the lease and that moreover the lease was to terminate at the latest on December 31, 1949. In short the company had an option to purchase, which, had not this condemnation proceedings intervened, it could have exercised at the very latest ninety days after December 31, 1949, or on March 31, 1950, and the right of first refusal up to June 30, 1950.

Both reason and authority substantiate the contention of appellants that contractual rights such as those of the Tavares Construction Company are "private property" which may be condemned and for which, upon condemnation, the sovereign must make just compensation.

For example, it has been well established that the United States is forbidden by the "due process" clause of the Fifth Amendment from legislating so as to impair the obligation of contract. The rationale of this doctrine is that contractual rights are "property" and that the United States is hence forbidden by the "due process" clause of the Fifth Amendment from depriving any person of his contractual rights, his "property," without due process of law.

*Union Pacific Railway Company v. United States* (1879), 99 U. S. 700, 25 L. Ed. 496;

*Continental Illinois N. B. and T. Company v. Chicago, R. I. and Pacific Railway Company* (1935), 294 U. S. 648, 79 L. Ed. 1110, 55 S. Ct. 595.

That contractual rights are property finds further support in the decisions under the United States Internal Revenue Code. Section 811 of that Code expressly confines the object of estate taxation to "property" as follows:

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible. . . ."

Yet, bonds, shares of profits in a partnership, rights of subrogation, annuities, and life insurance policies, to mention but a few examples, have been by court decision included in the gross estate of the decedent despite the fact that each of these species of property was clearly but a contractual right at the time of the decedent's death.

*Greener v. Lewellyn* (1932), 258 U. S. 384, 66 L. Ed. 676, 42 S. Ct. 324;

*Plummer v. Coler* (1900), 178 U. S. 115, 44 L. Ed. 998, 20 S. Ct. 829;



*McCledden v. Commissioner* (1942), 131 F. (2d) 165;

*Estate of Duval v. Commissioner* (1945), 152 F. (2d) 163.

In the absence of decisions upon the precise question of whether or not contractual rights are property within the contemplation of the Fifth Amendment, we would earnestly contend that either of the foregoing lines of decisions would adequately support an affirmative answer to that question, but precedent upon this very question is not lacking. In *Monongahela Navigation Company v. United States* (1893), 148 U. S. 312, 13 S. Ct. 622, 37 L. Ed. 463, for example, the State of Pennsylvania granted to the navigation company a franchise to collect tolls from ships passing through its locks. Thereafter the United States condemned those locks under its power of eminent domain, but denied any obligation to compensate the navigation company for the resulting extinguishment of its contractual right to collect tolls. In holding that the United States must make compensation to the navigation company for the condemnation of its franchise, the Supreme Court said at 37 L. Ed. 469:

“ . . . Before this property can be taken away from its owner the whole value must be paid; and that value depends largely upon the productiveness of the property; . . . ”

and at 37 L. Ed. 471 the court said:

“Because Congress has power to take the property, it does not follow that it may destroy the franchise without compensation.”

See, also:

*The West River Bridge Company v. Dix* (1847), 6 Howard 507, 12 L. Ed. 535.

Similarly in *Long Island Water Supply Company v. City of Brooklyn* (1897), 166 U. S. 685, 17 S. Ct. 718, 41 L. Ed. 1165, the City of Brooklyn condemned the water supply system of the plaintiff corporation and thereby extinguished the contractual right of the latter to hydrant rental. In that case the Supreme Court said at 41 L. Ed. 1167:

“A contract is property, and like any other property, may be taken under condemnation proceedings for public use. *New Orleans Gas Light Company v. Louisiana Light and H. P. and Manufacturing Company* 115 U. S. 650, 673. *It's condemnation is of course subject to the rule of just compensation*, and that is all that is implied in the decisions such as *Hall v. Wisconsin*, 103 U. S. 5, cited by counsel.” (Italics ours.)

To the argument advanced by plaintiff corporation in that same case that the condemnation in question was a contravention of the constitutional restriction against the impairment of contract, the court said at 41 L. Ed. 1167:

“The true view is that the condemnation proceedings do not impair the contract, do not break its obligations, but appropriate it, as they do the tangible property of the company, to public use . . . The Commissioners after a hearing, valued first the tangible property at \$370,000.00 and the franchise, contracts, and all other rights, and property, including this particular contract at \$200,000.00. *In other words, the condemnation proceedings did not repudiate the contract but appropriated it and fixed its value.*” (Italics ours.)

The foregoing decisions clearly established the doctrine that not only are contractual rights “property” which are

capable of being condemned by the state but also that just compensation must be paid for that property, when condemned.

Prior to the taking by the Government, the Tavares Construction Company had a purchase option. After that taking, the Company had nothing. Obviously, its option was extinguished by the Government's acts of condemnation, and only by those acts. It would seem to be implicit in the Fifth Amendment that what the Government takes in condemnation proceedings, the Government can, and must, make just compensation for in those same proceedings. In these proceedings, the Government took from the Tavares Construction Company its lease and the option to purchase. We believe that the Fifth Amendment requires that the Government make just compensation to the Company in these same proceedings.

We submit therefore that the trial court was in error in holding that it was without power to award compensation to the Tavares Construction Company for the extinguishment of its purchase option. To the contrary we submit that that option was a contractual right constituting "private property" within the contemplation of the Fifth Amendment; that upon its taking the Government became immediately obligated to make just compensation to the Tavares Construction Company; that that compensation is determinable in these eminent domain proceedings; and that it was error to relegate the Tavares Construction Company to the Court of Claims to establish its right to compensation.

II.

The Trial Court Was in Error in Instructing the Jury That "Market Value" Was the Proper Measure of Compensation to Be Awarded to the Tavares Construction Company for the Taking of Its Rights Under the Agreement of Lease.

(A) Under the Applicable Law of the State of California, Appellants May Assign as Error the Instructions of the Trial Court.

Before challenging the correctness of the instructions given by the trial court, we point out that it is the privilege of appellants to do so despite the fact that no exception was taken by appellants to those instructions at the time they were given.

In light of the fact that Rule 81 of the Federal Rules of Civil Procedure, Title 28, U. S. C. A., Sec. 723c expressly provides that those rules shall not be applicable to the trial of "proceedings for condemnation of property under the power of eminent domain," the Second War Powers Act provided as follows:

"Sec. 632: The Secretary of War, the Secretary of the Navy, or any other officer, board, commission, or governmental corporation authorized by the President . . . may cause proceedings to be instituted . . . to acquire by condemnation, any real property (etc.) . . . that shall be deemed necessary for military, naval, or other war purposes, such proceedings to be in accordance with the Act of August 1, 1888 (25 Stat. 357; Title 40, U. S. C. A., Secs. 257, 258) or any other applicable federal statute . . . ."



The relevant section of the Act of August 1, 1888 is Title 40, U. S. C. A., Sec. 258 and it provides as follows:

“The practice, pleadings, forms, and modes of proceedings in causes arising under the provisions of Sec. 257 of this title shall conform, as near as may be, to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the state within which such District Court is held, any rule of the court to the contrary notwithstanding.”

The necessity of exceptions to instructions would hence be controlled by the applicable law of the State of California. That law is Section 647 of the Code of Civil Procedure of the State of California and provides as follows:

“The verdict of the jury, the final decision in an action or proceeding, an interlocutory order or decision, finally determining the rights of the parties, or some of them, an order or decision from which an appeal may be taken, an order sustaining or overruling a demurrer, allowing or refusing to allow an amendment to a pleading, striking out a pleading or a portion thereof, refusing a continuance, an order made upon *ex parte* application, *giving an instruction although no objection to such instruction was made*, refusing to give an instruction, modifying an instruction requested, an order or decision made in the absence of the party or an order granting or denying a nonsuit or a motion to strike out evidence or testimony and a ruling sustaining or overruling an objection to evidence, *are deemed to have been excepted to.*” (Italics ours.)

By virtue of this statute all of the instructions given to the jury by the trial court are properly before this court for review, despite the fact that no specific exceptions were taken to them at the time they were given.

**(B) At the Time of Taking There Existed No Market for the Rights of the Tavares Construction Company Under Its Lease With the Defense Plant Corporation.**

The Agreement of Lease between the Tavares Construction Company and the Defense Plant Corporation contained as its Clause 24 the following words:

“Lessee will not without prior written consent of Defense Corporation and the approval of the Maritime Commission sell, assign, or pledge this lease or any of its rights or obligations hereunder, or sub-lease or permit the use by others of any of the property covered by this lease.”

Those words were obviously designed to prevent that lease from becoming an article of commerce. So long as they remained unstricken there was obviously no market for the lease, for notwithstanding the fact that the agreement created rights in the Tavares Construction Company itself, that company was effectively inhibited by Clause 24 from doing anything at all with those rights other than to enjoy them itself. It could neither sell, assign, pledge, sub-lease, nor even permit another to use the site and its facilities.

Government counsel and witnesses repeatedly brought to the attention of the jury the existence of this restrictive

clause in the Agreement of Lease. Charles B. Shattuck, for example, in testifying for the Government, said:

“Paragraph 24 provided that the Lessee should not sell, assign or pledge this lease in any manner without having the prior written consent of the Defense Plant Corporation. Also it provided that the Lessee should not sub-let either all or any part, or the machinery or the facilities, without the prior written consent of the Defense Plant Corporation.” [T. p. 1102.]

Later the same witness testified:

“With relation to the leasehold interest, it was my opinion that the terms of it were very uncertain and conjectural, so far as any possible purchaser was concerned. In other words, in the first place, it was not assignable, they could not pledge it or sell it without the consent of the Defense Plant Corporation and the country was involved in war, where the Government itself needed those kinds of facilities, and, therefore, it appeared doubtful that such a consent could be obtained.” [T. p. 1113.]

In the cross-examination of Barrett G. Hindes, a witness of the San Francisco Bridge Company, the following questions were asked by Government counsel and the following answers were made by Hindes [T. p. 630]:

“Q. By your answer with relation to the fair market value of that land, did you mean what your lease (the San Francisco Bridge Company lease) could have been sold for on the open market, for cash? A. I was referring to what it was worth to us and I conceive that it would be worth at least that much, if not more, in the open market, as to its market value or as a sub-lease.

Q. If it didn't have a sub-lease clause permitting you to sub-lease it, it wouldn't be worth anything in the open market, would it? A. That would restrict it to the value which I would put on it for my own uses.

Q. So, if the clause to which we are referring were not within that lease, you couldn't get anything for it on the open market, is that right? A. Oh, naturally, if you can't sub-lease it; if it says you can't sub-lease it.

Q. And then the value for that purpose goes out the window, is that correct? A. It would."

Then in his final argument to the jury government counsel commented upon the testimony of Hinder as follows [T. p. 1261]:

"All right. Here is the thing that Mr. Hinder said was such that he never would have even signed this lease in the first place.

'22:' —no, I beg your pardon. That is wrong. That is not the assignment clause. Mr. Hinder did not discuss this clause.—

'22: Lessee may use such site, facilities and machinery only for the construction by lessee of boats for sale to the government, unless otherwise permitted, in writing, by Defense Corporation with the consent of the Maritime Commission noted thereon.'

'24: Lessee will not without prior written consent of Defense Corporation and the approval of the Maritime Commission sell, assign, or pledge this lease or any of its rights or obligations hereunder, or sublease or permit the use by others of any of the property covered by this lease.

'Mr. Willing Buyer, I want to sell you this lease. I want to assign it. I want to sublet a part of it to you. What will you give me?



‘Why, Mr. Tavares you can’t do that without you get the consent of the Defense Plant Corporation and the Maritime Commission. I wouldn’t give you five cents for it. How do you know that they are going to let you make a profit on this paper? Is it reasonable to suppose after they put up for you \$2,-700,000.00 and build you a shipyard, that they will permit you to go ahead and sell this paper.’ ”

Indeed each individual juror was privileged to examine the actual Agreement of Lease itself, admitted into evidence as it was as Exhibit “W” [T. p. 697], and thereby to confirm the testimony of witnesses and statement of counsel that the Agreement of Lease in question was incapable of alienation by the Tavares Construction Company unless such alienation was consented to by the Defense Plant Corporation and was approved by the Maritime Commission.

As with all other properties so restricted in its alienability, the market for the lease, if not completely nonexistent, was so narrow as to be virtually so. Government counsel not only conceded, but insisted, that only the foolhardy would have bought such a lease in the very teeth of its own prohibition against sale, and with this contention appellants are in complete accord. At the date of taking there clearly existed no wider market for the rights of the Tavares Construction Company than the market for an inalienable life estate or the market for the income from a spend-thrift trust.

**(C) "Market Value" Is Not the Proper Measure of Just Compensation When the Condemned Property Is Not Marketable.**

In condemnation proceedings market value of the property taken is admittedly the normal measure of just compensation.

Indeed in *United States v. Miller* (1943), 317 U. S. 369, 63 S. Ct. 276, 87 L. Ed. 336, the Supreme Court said:

"It is conceivable that an owner's indemnity should be measured in various ways depending upon the circumstances of each case and that no general formula should be used for that purpose. In an effort, however, to find some practical standard, the courts early adopted and have retained, the concept of market value."

In spite of this broad generalization, the Supreme Court has recognized in other cases that under certain circumstances "market value" is simply not an appropriate measure of compensation in condemnation proceedings. In the late case of *United States v. General Motors Corporation* (1945), 323 U. S. 373, 65 S. Ct. 357, 89 L. Ed. 311, for example, that court, speaking through Justice Roberts, said at 89 L. Ed. 318:

"In the light of these principles it has been held that the compensation to be paid is the value of the interest taken . . . in the ordinary case, for the want of a better standard, market value, so-called, is the criterion of that value. *In some cases this criterion cannot be used either because the interest condemned has no market value or because, in the circumstances, market value furnishes an inappropriate measure of actual values.*" (Italics ours.)

That same court in *United States v. New River Collieries Company* (1923), 262 U. S. 341, 43 S. Ct. 565, 67 L. Ed. 1014, had earlier recognized that "market value" was not an invariable measure of value. That case involved the requisitioning by the government of a quantity of coal owned by the plaintiff. In speaking of the measure of compensation, the Court said at 67 L. Ed. 1017:

"Where private property is taken for public use, and *there is a market price prevailing at the time and place of the taking, that price is just compensation.*" (Cases cited.)

"The United States admits that market price is usually a basis for ascertaining the pecuniary equivalent, but suggests that sometimes an article has no market price, and that in such cases 'proof of real value' is admissible and that therefore market value and just compensation are not necessarily synonymous. The court below excluded evidence offered by the United States to show the owners cost of production and a reasonable profit. This ruling was right, because *it was shown beyond controversy that there were market prices prevailing when and where the coal was taken.*" (Italics ours.)

The court also quoted with approval the following language from the opinion of the Circuit Court of Appeal (276 Fed. 690 and 692):

"If it be an article commonly traded in on a market, and it is shown that, at the time and place it was taken there was a market in which like articles in volume were openly bought and sold, the prices cur-

rent in such a market will be regarded as its fair market value and likewise a measure of just compensation for its requisition.” (Italics ours.)

and concluded its opinion with these words at 67 L. Ed. 1018:

“The owner was entitled to what it lost by the taking. The loss is measured by the money equivalent of the coal requisitioned. It is shown by the evidence that every day representatives of foreign firms were purchasing, or trying to purchase, export coal. Transactions were numerous and large quantities were sold. Export prices for spot coal were controlled by the supply and demand. *These facts indicate a free market.* The owner had a right to sell in that market, and it is clear that it could have obtained the prices there prevailing for export coal. It was entitled to these prices.”

See, also:

*Blake Company v. United States*, 275 Fed. 861 (1922).

These words of our highest court make indisputable the fact that as a prerequisite to the application of “market value” as the measure of compensation there must be, if not a “free market” at least *a market*. When there is such a market, “market value” furnishes a simple and convenient measure of compensation. When, however, a market is demonstrably non-existent, “market value” is clearly a fiction and cannot be invoked as a fair measure of the just compensation commanded by the Fifth Amendment.



(D) The Trial Court Instructed the Jury That “Market Value” Was the Proper Measure of Compensation to Be Awarded the Tavares Construction Company and Hence Directed the Jury to Apply an Inappropriate and Inapplicable Measure of Compensation.

The trial court’s instruction to the jury is given in full in the transcript [T. p. 1279]. Because of their length we shall not set them out in full in this brief. The following extract will be sufficient however, to indicate the measure of compensation which the trial court instructed the jury to apply:

“Ladies and gentlemen of the jury, you are instructed as follows . . . [T. p. 1287]. In determining the fair market value of lands taken, the just compensation to the owner is that sum of money which, considering all of the circumstances disclosed by the evidence, could have been obtained for the lands by an informed seller offering them in the open market for cash. It is the amount that in all reasonable probability would have been arrived at between an informed owner, willing, but not compelled to sell, and an informed purchaser, willing, but not compelled to buy. In arriving at that value, you will take into account all the considerations that would fairly be brought forward and reasonably be given weight by well informed men engaged in such bargaining . . . [T. p. 1293]. With relation to the interests of the defendant, Tavares Construction Company, and its associates, such interests are to be evaluated at a later date than the interests of other defendants taken herein. The interests of the Tavares Construction Company and its associates arise out of an instrument which is in evidence as defendants’ Exhibit W, an agreement entered into between Tavares Construction Company and the Defense

Plant Corporation; you are to determine what is the fair market value of the interests arising out of such instrument, to wit, what is the amount for which the interests of said Tavares Construction Company and its associates under said instrument of agreement could have been sold for on the open market for cash on December 23, 1944, the date it was taken or cancelled by this proceeding or within a reasonable time thereafter; and in this connection if you find that the interest of Tavares Construction Company and its associates under said instrument of agreement is so speculative and conjectural that no purchaser in the open market would have purchased the same except for a nominal consideration, then your verdict as to the interest of the Tavares Construction Company and the Concrete Ship Constructors herein must be in a nominal figure only. You are to take into consideration the terms and conditions of the whole of said agreement and are to consider what effect, if any, a willing seller and a willing buyer would give to all of the terms and conditions of said agreement with Defense Plant Corporation in arriving at a determination as to the price for which the interest of said Tavares Construction Company and its associates under said instrument of agreement would bring at such sale . . . [T. p. 1295]. Evidence has been received in this case in relation to the interest of the defendant, Tavares Construction Company, Inc. That interest arises out of an instrument which is in evidence as defendant's exhibit W. That interest is a lease coupled with an option. In your consideration of that feature of the case you will proceed in the same manner as you proceeded as to the market value of the land, the question being what could it have sold for on the open market for cash on December 23, 1944, the date it was taken

or cancelled by this proceeding, or shortly thereafter, above what Tavares Construction Company would have to have paid under all its terms and conditions. If you find the company could have made such a sale your verdict will be for the amount you in your judgment determine the company could have gotten for it. You will consider the entire instrument, not just parts of it. *If you find it could not have been sold then your verdict as to Tavares Construction Company, Inc., will be zero.*" (Italics ours.)

Sometime after the jury retired from the courtroom to deliberate, it returned and asked to hear again the instructions concerning the Tavares leasehold [T. p. 1300] and in compliance with this request the trial court repeated the prior instructions concerning the Tavares Construction Company.

It is obvious from the record that the jury was hence charged not once, but twice, that as regards the Tavares Construction Company the proper measure of compensation was "market value."

As regards appellants the court's instructions may be summarized in the final single sentence:

"If you find it could not have been sold, then your verdict as to Tavares Construction Company, Inc. will be zero." [T. p. 1295.]

In light of the manifest non-existence of any market for the lease in question, such an instruction, we submit, was nothing more than a direction by the court to award nothing to the Tavares Construction Company as compensation for the taking of its contractual rights under its lease with the Defense Plant Corporation. As such a direction, that charge was, we believe, clearly reversible error since there was testimony in the record that those

rights were worth \$600,000.00 [T. p. 802], \$500,000.00 [T. p. 831], \$573,000.00 [T. p. 869], and \$500,000.00 [T. p. 881]. When that evidence is interpreted in the light most strongly in favor of the appellants, we submit that it could under no conceivable interpretation support a directed verdict for the appellees.

Even if those instructions are not interpreted by this court as being tantamount to a directed verdict for the appellees, we submit that the trial court was clearly in error in setting up "market value" as a proper measure of just compensation for the taking of property for which there was admittedly no market. "Market value" in this case was no more appropriate as a measure of compensation than would be "value to the owner" if a microscope were taken from a blind man, or gloves from an armless man.

Government counsel sought throughout the proceedings to prove that the rights of appellants were inalienable but then asked for, and was given, an instruction predicated upon the property in question having the very thing the Government proved that it did not have—a market. We submit that the Government would have been no less inconsistent had it proved that the property taken was realty but then sought an instruction that the measure of compensation should be the market value of eggs.

The option to purchase was originally given to the Tavares Construction Company in exchange for a valuable consideration. As stipulated by counsel [T. pp. 738, 698 and 299—Stipulation 29], that option was granted by the Government in lieu of the normal contractor's fees to which the Tavares Construction Company would have been entitled for its work in the erection and construction



of the yard and works which the Government has condemned in these proceedings. The Tavares Construction Company parted with its right to receive fees of a very substantial character in order to obtain that purchase option. Now the Government contends that that option is valueless and that it may take back the lease coupled with the option without making any compensation to the Tavares Construction Company. Because the lease and option could not be alienated without the consent of the Government, the Government claims they had no value. Yet, to obtain that very option, the Tavares Construction Company surrendered its right to receive fees which measured in accordance with the evidence [T. pp. 741 and 765] amounted to approximately \$270,000.

Should it be held that “market value” is the proper measure of compensation for the taking of inalienable property, the Government would thereby be placed in a position whereby it could avoid the necessity of performing any of its contracts. By the simple expediency of stipulating in each of its contracts that the contract could not be alienated without the consent of the Government, the Government could then condemn any one of those contracts when the obligations of the contract became burdensome—and moreover, make no compensation for the taking! Such a procedure, we believe, could not be held to meet the requirements of the Fifth Amendment. Nor, we submit, does that attempted procedure meet those requirements in the case at bar.

The crux of the entire proceedings below was valuation. In light of its paramount importance we submit that the trial court’s instructions that “market value” was the proper measure of compensation was clearly reversible error requiring the remand of this cause for a new trial.

**(E) The Appropriate Measure of Compensation for the Condemnation of the Rights of the Tavares Construction Company Under the Agreement of Lease Is the Difference Between the Value of the Facilities, Machinery and Site as of December 23, 1944, and the Option Price on That Same Date.**

From the admitted power of the Defense Plant Corporation to block the sale, assignment, pledge or sub-lease of the Agreement of Lease, Government counsel and witnesses proceeded to draw the demonstrably insupportable conclusion that the lease was therefore of no value.

The fallacy of such a position may best be revealed by pointing out that there are many things which cannot be alienated—but which yet have value. A life estate restricted against alienation can be neither sold, pledged, assigned, sub-leased nor given to another, yet to the life tenant it clearly has value. Likewise the income from a spendthrift trust is in many states incapable of being anticipated by assignment, pledge, gift or sale, yet to the life beneficiary it clearly has value.

Traditionally property is considered as being a “bundle” of rights, one among them being the right of alienation. The basic fallacy of the Government lies in its contention that the rights to use, to enjoy, and to exercise a purchase option are valueless to the Tavares Construction Company in the absence of the right to alienate. Certainly in states having inheritance taxes one is not privileged to consider such inalienable property to be valueless when computing the inheritance tax due upon the devolution after death of property restricted against alienation during the life of the devisee. Nor under the Federal Estate and Gift Tax sections of the Internal Revenue Code is the transfer of such inalienable property considered by the Commis-

sioner of Internal Revenue to be the transfer of property having no value.

If the Government's position were tenable, any transfer of land held in trust for charitable purposes would be a transfer of no value, for it is obvious that there exists no market for property encumbered with such a trust.

As pointed out by counsel for appellants in the hearing of their Motion for a New Trial, the affection of a spouse is hardly a saleable commodity, yet in a suit brought for alienation of affection the affection of a spouse is repeatedly held to be a thing of value. Likewise, one's arms are not marketable, yet the courts do not deem an arm to be valueless when it has been injured or lost through the negligence of another.

Such examples of inalienable, but valueable, property may be multiplied with ease, but the few instances which we have here cited establish beyond question, we believe, that alienability, though admittedly enhancing value, is not a *sine qua non* of value.

The question then arises: Admitting that the rights of the Tavares Construction Company may have value despite the fact that they were not marketable, what is the proper measure of their value in eminent domain proceedings?

The courts in the past have not deemed themselves powerless to determine just compensation when the evidence revealed that there was no market for the condemned property. Nor is this court powerless to establish just compensation in the case of the inalienable option of the Tavares Construction Company.

In *Matter of Albany Street* (1834), 11 Wend. (N. Y.) 149, certain land was taken from the churchyard of Trinity Church for use as a street. In speaking of the proper measure of just compensation, the court said:

“It seems to me the true rule of estimating the damage is to appraise the property at its present value to the owner, considering the extent of the interest which the owner has, and the qualified right which may be exercised over it. If the church holds the absolute interest in the churchyard and may, if they choose, convert it all into building lots, then the rule adopted by the Commissioners in their assessment for damages is correct; but then they should apply the same rule in their assessment for benefits. If on the other hand, the church, as I suppose, cannot use the churchyard for any purpose but for burying the dead, then a different rule should be adopted, both as to damage and benefit.”

The rule there adopted by the New York Court when the use of the land is so restricted as to eliminate any market for it, was “its present value to the owner, considering the extent of the interest which the owner has, and the qualified rights which may be exercised over it.”

In *Matter of East River Gas Company* (1907), 119 App. Div. 350, 104 N. Y. Supp. 239, the gas company sought to condemn a tract of land upon an island which had been deeded to the City of New York for perpetual use for general charitable purposes. Because of that limitation in its deed, the City of New York was obviously incapable of conveying title in fee simple. In the condemnation, however, damages were awarded to the city measured by what “the property would be worth for ordinary commercial purposes if presently available therefor.” In



short, in its award of damages the court treated the property as if it were freely alienable notwithstanding the fact that it was manifestly otherwise.

See, also:

*Stebbing v. Metropolitan Board of Works*, L. R.  
6 Q. B. 57 (England, 1870).

The absence of uniformity among cases involving the condemnation of restricted property indicates that, given a situation making inapplicable "market value" as a standard, the courts must, in the exercise of their own wise discretion, evolve a standard, which, under the circumstances, is most likely to measure a compensation which is "just."

Our examination of the lease agreement here in question has already established, we believe, that the Tavares Construction Company had at the date of the Government's taking a non-transferable right to possess and use the shipyard in question, rent-free until December 31, 1949, unless the lease was sooner terminated by either party, in which event the company had for ninety days a right to purchase the shipyard at an ascertainable option price and the right of "first refusal" for an additional ninety days.

The Tavares Construction Company hence had an interest in property under lease. Now, in the condemnation of leased property the accepted rule is that the total award must be based upon the value of the undivided fee. For instance in *State v. Anderson* (1929), 176 Minn. 525, 223 N. W. 923, the court stated:

" . . . No contracts between the owners of different interests in the land can affect the right of the

Government to take the land for the public use or oblige it to pay by way of compensation more than the entire value of the land as a whole.”

And in *Carlock v. United States* (1931), 53 F. (2d) 926 it was said:

“The total amount of damages must be the same, whether the land is owned by one person or several.”

Indeed, as regards the interests of the defendants, City of National City, as lessor, and of the San Francisco Bridge Company, as lessee, the trial court so instructed the jury [T. p. 1292]. As between the City of National City and the San Francisco Bridge Company the charge correctly effected an apportionment of the total award.

The trial court, however, made no such requirement of apportionment concerning the interests of the lessor Defense Plant Corporation and the lessee Tavares Construction Company despite the fact that the Tavares Construction Company, like the San Francisco Bridge Company, was a lessee and, as such was part owner in possession of the shipyard.

The peculiarity of this particular condemnation—and that which has made these proceedings a great deal more complex than they would otherwise have been—is that the Government has played a dual role in the condemnation. It was the condemnor and at one and the same time part owner of the property condemned. As regards the realty, the condemnation extinguished the rights of the Government as lessee from the City of National City and likewise its rights as lessor to the Tavares Construction Company. As regards the personalty the condemnation extinguished the Government's rights as lessor to the

Tavares Construction Company. Faced with this duality of the Government in the condemnation, the trial court simply ignored the ownership of the Government prior to the condemnation proceedings. For the Government this amounted to a gift since it was thereby not compelled to share any part of the "award" with the Tavares Construction Company. As regards the Tavares Construction Company, however, this ignoring of the Government's prior ownership was most prejudicial in that it gave to the Government exclusively that which should have been apportioned between the Government and the Tavares Construction Company.

It would facilitate analysis of the problem to assume that a private person, X, stood in the shoes of the Defense Plant Corporation (or the Government) at the time of the condemnation. It is self-evident that the total award for the facilities and machinery would then have had to be apportioned between X, as lessor, and the Tavares Construction Company, as lessee, on the basis of X's absolute ownership of that property and the lease and option of the Tavares Construction Company.

Certainly under these circumstances, it could hardly be maintained that X would be entitled to the entire award and the Tavares Construction Company be entitled to nothing. Yet, with the Defense Plant Corporation substituted for X, the judgment of the court below was in effect an award of all of the facilities and machinery to the lessor, the Defense Plant Corporation, leaving nothing for the Tavares Construction Company, as lessee.

We believe it to be incontrovertible that there should have been a total award, apportioned between the Defense Plant Corporation and the Tavares Construction Com-

pany. Any apportionment of this award to the Defense Plant Corporation would of course have been fictional, or a mere bookkeeping transaction, since the Defense Plant Corporation was itself an agency of the Government. Unless, however, the ownership by the Defense Plant Corporation of the machinery and facilities is treated for purposes of valuation as having been condemned, the trier of fact, as in the trial below, is confronted with the insuperable task of making its evaluation in a vacuum, that is, of trying to evaluate a leasehold without reference to the value of the property leased.

We submit that the valuation of the entire leased property is mandatory even when the Government is both the condemnor and the lessor of the property condemned.

The problem of establishing a formula whereby the total award may be justly apportioned between the lessor and the lessee with an option to purchase, though seemingly difficult, is in reality amenable to certain well established principles.

In 5 Williston on Contracts, Section 1338 it is said:

“In fixing the amount of (damages for breach of contract) the general purpose of the law is, and should be, to give compensation, that is, to put the plaintiff in as good a position as he would have been in had the defendant kept his contract.”

And this general principle has given rise to the well known rule that the plaintiff in an action for breach of contract is entitled to damages measured by the difference in value between that which he would have received and that which



he would have had to surrender had the contract been performed on both sides.

*Pierson v. Iwai* (1922), 285 Fed. 774;

*American Mfg. Co. v. United States Shipping Board* (1925), 7 F. (2d) 565.

In the case of an option to purchase, the measure of damages, the compensation necessary to "put the plaintiff in as good a position as he would have been in had the defendant kept his contract," is clearly the difference in value between that which the optionee would have received and the price he would have had to pay had he exercised his option to purchase. If that measure of damages gives to an optionee just compensation when his option has been lost by breach of contract, we submit that that same measure is applicable when the option has been taken by the Government in an eminent domain proceedings inasmuch as the mandate of the Fifth Amendment is only that the compensation be "just."

In the case at bar the compensation due the Tavares Construction Company would be, we submit, the difference between the option price as of December 23, 1944, and the value of the site, facilities and machinery as of that same date. Such a measure is one of convenient and easy application by the trier of fact since the option price was on the date of taking a sum calculable by means of formulae stipulated in the Agreement of Lease [T. p. 58] and the value of the shipyard as of that date is a matter for expert testimony.

We wish to make it clear that we do not contend that a contract measure of damages is intrinsically the proper measure of damages in these proceedings. Our conten-

tion is simply that in this particular condemnation proceeding, as between the Defense Plant Corporation and the Tavares Construction Company, such a measure is an appropriate measure of "just compensation" for the property taken from that Company.

As long ago as 1856 this problem of awarding just compensation to a lessee with a purchase option was before a Pennsylvania court in *Northern Pacific Railway Company v. Davis and Leeds* (1856), 26 Pa. 238. In that case the lessees had a lease of certain land for two years at \$600 per year with an option of a three year renewal at \$800 per year. The Northern Pacific Railway then condemned the land but challenged an award which reflected the value of the renewal option. In upholding the award, the reviewing court said at page 241:

"The direct injury done to them—or in other words the value of the thing taken from them, was to be measured by the worth of the lot, at the stipulated rent, for the residue of the term of two years, and for the whole of the term of three years. No assessment of damages or compensation would have been just and adequate that did not embrace both these terms, for the true measure of the interest the lessees had in the land was the joint or aggregate value of the two terms."

And at page 242 the court said:

"The defendants held their interest, as all citizens hold real estate, subject to appropriations for public use, but their right of compensation was coextensive with their interest, and the company having taken the whole of it, the inquest did no more than assess the value of the whole."

Similarly in *Herzey v. Board of Chosen Freeholders of Essex County* (1926), 99 N. J. Eq. 525, 133 Atl. 872, the lessee of certain premises had a three-year lease with a renewal option for two years, but upon condemnation of the premises the lessor claimed the entire award. In apportioning the award between lessor and lessee, the New Jersey Court of Chancery said at 133 Atl. 872:

“The lessee is entitled to compensation for the value of her lease for the unexpired term, plus the sum that the value of the option adds to the value of the lease for the unexpired term.”

The lessee was thereupon awarded \$287.50 as compensation for the unexpired term and \$600 for the renewal option.

The case which most nearly resembles the case at bar is *Phoenixville, Valley Forge, and S. E. Railway Company's Appeal* (1918), 70 Pa. Sup. Ct. 391. It appeared that the optionee in that case had acquired an option to purchase for \$3,975.00 certain lands which the state thereafter condemned for a park. Subsequent to the initiation of the condemnation proceedings, the optionee sought to exercise its option. The “viewers” of the property awarded nothing to the optionee, but this was reversed on appeal, the court saying at page 395:

“One who under a properly executed agreement has an option to purchase land does not hold the lands, nor even an absolute agreement that he is to have the lands conveyed to him, but he does get something of value, that is, the right to call for a conveyance of the land if he elects to purchase in the manner specified.”

The court then held that the owner of the land was entitled to \$3,975.00 of the award and that the railway was entitled to the balance of the award over and above the option price.

We submit that in the case at bar the Defense Plant Corporation is likewise entitled to an apportionment equal to its option price as of the date of taking, but that the balance of the total award, if greater than the option price, must go to the Tavares Construction Company.

Other cases, notably *Cullen and Vaughn Company v. Bender Company* (1930), 122 Ohio State 82, 170 N. E. 633; *Cornell and Andrews Smelting Company v. Boston and P. R. Corporation* (1911), 209 Mass. 298, 95 N. E. 887, and *Schnce v. Elston* (1930), 299 Pa. 100, 149 Atl. 108, have invoked a "trust fund" doctrine to arrive at the same result in making the apportionment of an award between a lessor and a lessee with a purchase option. This doctrine is that the owner of the property, the lessor, is to be given the entire award, but that he must then hold that award as a trust fund subject to the option of the lessee to purchase that award by paying to the lessor the option price of the condemned property. In other words, the award is treated in legal contemplation the same as the property taken in condemnation. Whether the total award be here apportioned by the court between the Defense Plant Corporation and the Tavares Construction Company or whether the total award be given to the Defense Plant Corporation subject to the right of the Tavares Construction Company to acquire that award by exercising its purchase option is immaterial to the appellants. In either case the compensation for the Tavares Construction Company would be the difference between



the total award and its option price as of the date of taking.

We submit therefore that the judgment of the trial court should not only be reversed but that these proceedings should be remanded to that court with directions to make an award of compensation in accordance with the principals here set forth.

### III.

#### **The Trial Court Was in Error in Admitting Into Evidence Certain Correspondence Relating to an Offer of Compromise by the Tavares Construction Company.**

Counsel for the Government offered in evidence [T. p. 769] a certain letter and, over the objection of counsel for the appellants, that letter was received in evidence. The letter in question, written by Concrete Ship Constructors and directed to the Eleventh Naval District, read as follows:

“In explanation of our letter of November 21, 1944, and in compliance with Captain F. P. Conger’s requests, we wish to be more specific regarding the considerations for our release of the option held by this company, for the acquisition of certain facilities at National City California with the Defense Plant Corporation. These considerations are as follows:

1. To permit this company the free use of existing facilities to complete necessary war contracts.
2. To permit this company the free use of facilities to carry on ship repair work for Governmental agencies until such time as the Navy needs to convert these facilities to other purposes.

3. To give this company a contract for the construction of the necessary Navy alterations to convert property to Navy requirements.

Alternate for Item 3: Make payment to this company in the sum of 3% of the facilities construction costs, or \$80,000.00 which is equivalent to a minimum construction fee for constructing the facilities.

“For your information, no fee or profits was allowed us for the facility construction, but in lieu thereof we were granted an option to purchase and the use of the facilities.”

This letter was at the most but an offer of the Concrete Ship Constructors (or the Tavares Construction Company) to compromise its claim against the Government arising out of the condemnation of its lease and option.

It is well established that such offers of compromise are inadmissible in evidence upon the trial of a claim which one or the other of the parties sought to compromise. In 3 Jones Commentaries on Evidence, Section 1052, it is stated:

“Overtures for the compromise of controversies are frequently made by parties who, in good faith, believe in the justice of their claim or defense, but who desire to avoid the annoyance and uncertainty of litigation. Hence, offers of compromise are not necessarily any admission that the claim or defense is lacking in merit; and, in a civil action at least, such offers are not in general admissible.”

In section 1054 of the same treatise it is flatly stated:

“Offers by a party, with a view to compromise, to pay or accept a sum of money or to make deduction, or to submit to arbitration, or to surrender certain

property, or to purchase the property in dispute, and in general any efforts to secure a settlement, are inadmissible.”

At the time the letter in question was offered in evidence, counsel for appellants made the specific objection that it was “part of an unaccepted offer of compromise, which resulted from negotiations carried on between the parties to this action for the period of at least one year.” This objection, however, was overruled [T. p. 769] and the offered letter was admitted despite the fact that section 997 (formerly Sec. 895) of the Code of Civil Procedure of the State of California expressly provides that an offer of compromise and failure to accept cannot be given in evidence.

“Sec. 997. The defendant may, at any time before the trial or judgment, serve upon the plaintiff an offer to allow judgment to be taken against him for the sum or property, or to the effect therein specified. If the plaintiff accept the offer, and give notice thereof within five days, he may file the offer, with proof of notice of acceptance, and the clerk, or the justice where there is no clerk, must thereupon enter judgment accordingly. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence upon the trial; and if the plaintiff fail to obtain a more favorable judgment, he cannot recover costs, but must pay the defendant’s costs from the time of the offer.”

See:

*Scott v. Sciaroni* (1924), 66 Cal. App. 577, 226 Pac. 827.

The case of *Citti v. Bava* (Calif., 1927), 254 Pac. 299, laid down the following rule:

“If a clear admission of a distinct fact is made in the course of negotiations for a settlement, such fact is admissible in evidence against the party making it, even though it forms a part of an offer to compromise, but all other admissions in negotiations for a compromise are regarded as hypothetical admissions, from which it is not proper to draw any inference of liability, and are therefore not to be received in evidence.”

The court went on to say at page 304:

“It is very often a wise thing, however unsound a complaint may be, for a person to pay a sum of money and buy his ‘peace’ and thereby rid himself of the annoyance and trouble incident to litigation. Peace to some people is so desired that they seek it, even at a sacrifice of their legal rights, and in such a case the purchase of peace is not to be taken that the purchaser was at fault, but merely that he is willing to sacrifice his legal rights and pay a sum of money to quiet the complainant and avoid trouble and litigation.”

We submit that this rule is equally applicable to the offer in evidence of appellants’ letter. That letter was nothing more than an attempt to establish a basis upon which a settlement might have been worked out—not an admission that appellants valued their lease and option at no more than \$80,000, as counsel for the Government argued before the jury. [T. p. 1265].

We submit therefore that the admission into evidence of that offer of compromise was most prejudicial to appellants and was error requiring the reversal of the judgment below.



IV.

**The Final Argument of Government's Counsel Was Designed to Prejudice and Inflamm the Minds of the Jurors and, as Such, Was Reversible Error Requiring the Remand of These Proceedings for a New Trial.**

The type of final argument made by Government's counsel may best be illustrated by reproducing the many inflammatory statements made in the course of that argument. The following extract reveals the extent to which that argument was designed to arouse the prejudices of the jurors against appellants:

"Mr. Landrum: May it please the court, ladies and gentlemen of this jury . . . [T. p. 1255]. Whatever else may be said Mr. Tavares is a capable business man. He cut himself into this wartime Garden of Eden without the expenditure of a penny. He built concrete barges for the government of the United States at a profit, and now he asks you to put your hands into the pockets of the people of the United States and to give him a half a million more . . . [T. p. 1267]. Ladies and Gentlemen, on the 24th day of November, 1944, they say, 'We want you to give us \$80,000 for supervising the putting in of the things you bought for us to make ships with to sell to you. We want you to give us \$80,000.' You will have these papers. If that isn't right—if what I have read to you isn't right, throw me out the window. But, my goodness, are you going to permit those people to go into the Treasury of the United States, when we come in here in a condemnation case, and get any more? Well, if you think they are entitled to that, you give it to them. But if you think it would be right for me to say to you, 'I want

to get some money out of this war business. I want you to spend \$2,700,000.00 to build me a shipyard to build concrete ships to sell to you at a profit, and then after it is all through and done, I want you to give me \$80,000 for building my own shipyard, and supervising that, and then on top of that I have taken the expenses, I have taken vacations for my office force.' . . . [T. p. 1268]. They were using the facilities which were purchased by the money of the people of the United States to engage in private repair work for private individuals and asking you to come in here and give them a half a million dollars. . . . [T. p. 1275]. And, ladies and gentlemen, it is my very earnest conviction, when you have done that, you will say to the people of the United States, 'We do not feel that we are going to take any of your money to give to the Tavares Construction Company.' . . . [T. p. 1277]. I feel I have been as honest and fair as it is possible for me to be. I want you to know that I consider it a great honor to have the long experience I have had. I entered the Department of Justice in 1909. I am proud of it. I have grown old and tired. I want to go home. *But this Tavares claim hurts me.* . . . ." (Italics ours.)

These statements of counsel were absolutely without foundation in the record. There was no evidence at all that the Tavares Construction Company had made a large profit—nor even a small one. But had there been evidence in the record that the company had made a profit of ten million dollars or even ten billion dollars, we submit that it would have had no relevance whatsoever in the determination of the just compensation to be awarded the company for the taking of its property. To demonstrate the irrelevance of past profits, we need only point

out that when the Government condemns the bridge of a toll company, no inquiry is permitted as to whether the company has recouped its original investment by the collection of tolls. Yet, to be consistent with its position in the case at bar, the Government would have to contend that the company would be entitled to nothing upon condemnation if the total of its tolls had already equalled its original outlay in construction of the bridge. Similarly the Government would have to contend that a farmer would not be entitled to compensation for the condemnation of his land if his total return from the farming of that land had already equalled its original purchase price to him. Such a contention is, of course, completely untenable, yet in the case at bar, the implicit argument of the Government was that the Travares Construction Company should be allowed no compensation because it had already received enough from the Government. Government counsel of course knew better than that and refrained from making such an express argument; but that argument is implicit in counsel's every reference to what the Government had already done for the Travares Construction Company. The Government's argument was that since the Tavares Construction Company had profited from part performance of its contract with the Defense Plant Corporation, it was not entitled to full performance. We submit that the law of contracts long ago established the converse.

Because of the repeated and unwarranted references by Government's counsel to the things that the Tavares Construction Company had already received from the Government, the jury might easily have arrived at its decision on the ground that the Tavares Construction Company had thereby already received what the jury deemed

to be “just compensation” for the taking of its property. Certainly there can be no assurance, with the Government counsel’s argument in their minds, that the jurors did not permit themselves to be influenced by that argument.

We submit therefore that the final argument of the Government in itself warrants the reversal and remand of this case for a new trial.

V.

**The Trial Court Was in Error in Permitting the Jury to Determine the Legal Significance of the Agreement of Lease and Its Amendments Rather Than Instructing the Jury as to the Rights and Obligations of the Parties Thereunder.**

Government counsel attempted to prove the legal import of the Agreement of Lease and amendments by means of witnesses patently unqualified to construe such legal documents. The Government witnesses, Charles B. Shattuck, who, by his own testimony, was a “realtor and a real estate appraiser” [T. p. 1091], and Tom Mason, who, by his own testimony, was a “realtor and appraiser” [T. p. 1161], testified repeatedly as to their construction of certain clauses in the agreement and its amendments. Their lack of qualification so to testify is made apparent by the number of their conclusions which are demonstrably in error.

For example [T. p. 1114], Shattuck testified as follows:

“Q. In other words, it is your understanding of Exhibit ‘W’ that they only have the use of the yard rent free when they were constructing boats for the Government? A. Yes.”



Prior to that he had already testified [T. p. 1104] to the same effect in the following words:

“There was a proviso in the lease which provided that the Tavares Construction Company was to have the free use of the site, and the machinery and the facilities after they had paid sufficient rent to reimburse the Government for the entire cost that it had been put to in the creation of this enterprise. *However that free rent was to be given them only for the construction of boats for the Government.*” (Italics ours.)

As a matter of fact, however, the Agreement of Lease contained no such limitation that the rent should be free only if the company was constructing boats for the Government. The pertinent clause in the lease [T. p. 56] merely provided as follows:

“When the total amount of rental which lessee shall be required to pay hereunder shall equal the amount expended by Defense Corporation under this Agreement plus interest on such expenditure . . . from the date thereof at the rate of 4% per annum less an amount equal to interest at 4% of each rental payment from the date of payment thereof, lessee shall not be required to pay any further rental.”

Shattuck also testified as follows [T. p. 1113]:

“Likewise the lease provided that this site, and this yard, and these facilities could only be used for the construction of boats for the Government, and that if at any time it was not so used, the Government had an option under paragraph (b) of paragraph 14 to transfer the facilities to any other department of the Government, and if it elected, if the Government should elect to do so, the lease could

be cancelled and no option could be had, and, therefore, you might say that the person who had this lease was merely there at the will of the Government."

Clause 14 of the Agreement of Lease, however, as a matter of fact, provided otherwise. Its words were as follows [T. p. 57]:

"Defense Corporation, by notice in writing with the approval of the Maritime Commission noted thereon, may, in addition to all other rights with reference to termination under paragraph 12 hereof, cancel this lease or extension thereof, in the event . . . (b) the Government shall request priorities for itself or others with respect to the use of the facilities to be provided hereunder, and Lessee shall fail or refuse to give such priority . . . ."

The most cursory examination of the words of the agreement itself reveal that the testimony of Shattuck in this regard was not only wrong but was highly misleading. His testimony was that the Defense Corporation could cancel the lease in question by merely exercising its right of priority. The Agreement of Lease itself clearly indicates that the Defense Corporation could cancel the lease only if it asked for priority but was refused it by the Tavares Construction Company. The difference between the two is, to say the least, significant. That Shattuck had an entirely erroneous conception of the Government's right to priority is revealed by the following which transpired upon cross-examination [T. p. 1126]:

"Q. So it is your understanding that under the lease the Government had a right, through exercising its priority rights therein granted, to merely take

over and use this property, and thereby end and terminate all rights of Concrete Ship Constructors? A. I don't think there is any question about it."

Shattuck was right in testifying that there was no question about it; but the answer to the question was exactly the reverse of that which Shattuck gave.

Shattuck further testified upon cross-examination as follows [T. p. 1129]:

"Q. By Mr. M. Martin: I am handing the witness a copy of Exhibit 'W'. Now, directing your attention to paragraph 12, where it states: '12: Subject to termination upon the terms hereinafter in this paragraph 12 provided Defense Corporation hereby agrees to sub-lease the site and to lease the facilities and machinery to be acquired hereunder, and does hereby sub-lease the site, and leases the facilities and machinery to be acquired hereunder, to lessee, and lessee does hereby lease and sub-lease the same from Defense Corporation for a term ending December 31, 1947, which term, upon its expiration, shall be automatically extended, subject to similar termination for an additional period ending December 31, 1949.'

Now, is it your understanding that had no condemnation been filed and had no notice been served by either party that upon the expiration of the lease there, the first period, December 31, 1947, that Concrete Ship Constructors could have on the 1st day of January, 1948, elected to purchase? A. No, they certainly could not; not under that.

Q. And is it your understanding that upon the expiration of the term ending December 31, 1949, that the lessee could on January 1, 1950, have elected to purchase? A. No, he could not; not in my opinion."

Further testimony of Shattuck [T. p. 1130] revealed clearly that he felt the Tavares Construction Company had no option to purchase upon the expiration of the lease. Examination of Clause 15 [T. p. 58] reveals that the company had as a matter of fact such an option. That clause provided as follows:

“Upon the *expiration* or termination of this lease or extension thereof pursuant to paragraph 12 hereof . . . lessee shall have and is hereby granted . . . the right and option . . . to purchase all but not part of the site, facilities and machinery . . .” (Italics ours.)

This testimony was not only misleading to the jury in determining the rights of the Tavares Construction Company at the time of their extinguishment by the taking of the Government, but it clearly revealed that Shattuck was unaware of all of the rights of the Tavares Construction Company at the time that he made his appraisal of the property taken from that company by the Government.

These examples do not exhaust by any means the instances where the Government's witnesses, qualified as “expert appraisers” sought to testify as “expert attorneys” and, in so doing, drew conclusions and made deductions that were plainly in error and as plainly misleading to the jurors.

In addition to the testimony of the Government's witnesses which revealed that they did not know what rights and obligations were created by the Agreement of Lease, the Government counsel in his final argument to the jury attempted to further confuse the jurors by saying [T. p. 1256]:

“But I say to you that the claim of the Tavares Construction Company in this goes out the window



by virtue of evidence which you can see, which you can feel, and which will stand out before you like the tall pines in the forest of truth. Every claim that it has in this lawsuit stems from Exhibit W. I say to you that, in reading that document, if you can tell me what it means, then you are probably a better man than I am. I tell you that, if the lawyers can agree on what that document means, they are better lawyers than I am. So, therefore, their rights stemming from Plancor 407 are what you are to determine.”

This argument by Government counsel would appear to be the argument of one “seeking to take advantage of his own wrong.” Attorneys for the Government drafted Plancor 407 (the Agreement of Lease). They inserted all of its clauses. They were the ones who made its language clear or unclear. Despite that fact, the Government in the trial below argued that the jury should give to the Travares Construction Company nothing because no one, not even lawyers, could agree as to what that document means. If the Agreement of Lease was, as a matter of fact, unclear, the responsibility for that lack of clarity rests with the Government and it should not in this case argue, nor be heard to argue, that the Travares Construction Company therefore has no rights under the lease.

As a matter of fact, the Agreement of Lease does have a definite meaning. That lease is complex, it is true, but we deny that it is meaningless. We submit that that complexity disappears upon careful analysis, and that, had this condemnation not intervened, no problem of construction would ever have arisen.

In light of the errors which the Government witnesses made—and naturally so—in their construction of the

agreement in question, and in light of the argument of Government counsel, based upon the testimony of the Government witnesses, that the lease was without meaning, we submit that it was clearly reversible error for the court not to have instructed the jury in detail as to the legal rights of the Tavares Construction Company under the Agreement of Lease rather than to have permitted the jurors to arrive unaided at their own construction of that complex and technical contract.

## VI.

### **The Evidence Is Insufficient to Support the Verdict and Judgment.**

The Government called two expert witnesses as to values, Charles B. Shattuck and Tom Mason, each of whom expressed the opinion that the Tavares Construction Company's interests had a market value of nothing [Tr. pp. 1116 and 1175]. Both of these opinions were based upon erroneous premises, and were therefore unworthy of consideration.

Mr. Shattuck understood that Tavares Construction Company was there merely at the will of the Government and that all of Tavares Construction Company's rights could be cancelled out at any time by the Government [T. pp. 1113 and 1126 to 1135]. He understood that this condemnation action was actually an election by the Government to cancel out all of Tavares Construction Company's rights, which cancelled the lease and the option and as a result thereof Tavares Construction Company had no rights to be compensated for in this action [T. p. 1135].

Mr. Mason based his opinion as to no value upon his opinion that the lease was too speculative because of the

many ifs, ands, and possibilities of this and that happening such as the right to remain on the property and to the option being cut off by condemnation, upon his knowledge of what happened after the last war to another shipyard realizing that we were out of war at the moment (thereby basing his appraisal on 1947 conditions instead of 1944 conditions), and because it was questionable as to whether Tavares Construction Company could obtain the consent to an assignment, all of which would throw up a question as to whether it would be a piece of paper that you could market [T. pp. 1200, 1202].

Appellants called four expert witnesses as to values of the leasehold estate of Tavares Construction Company. The opinions of these witnesses were: H. G. Hotchkiss \$600,000 [T. p. 802], Henry Phillip Anewalt \$500,000 [T. p. 831], Roy F. Bleifuss \$573,000 [T. p. 869] and Edwin A. Mueller \$500,000 [T. p. 881].

Three of these same witnesses testified as to values on behalf of the defendant City of National City. Their opinions as to values of the National City Tidelands were: Anewalt \$630,615 [T. p. 536], Hotchkiss \$655,474 [T. p. 554], and Mueller \$617,900 [T. p. 589]. The jury believed these witnesses as evidenced by their verdict of \$650,000 for National City [T. p. 1304].

Certainly the jury didn't believe these same witnesses 100% as to National City and disbelieve them 100% as to Tavares Construction Company. Obviously the jury followed the Court's final instruction that their verdict will be zero if they found that the lease could not be sold [T. p. 1301]. Obviously the jury read paragraph Twenty-four of the lease [T. p. 64] which prohibited the sale of

the lease without the consent of Defense Plant Corporation and which was so emphatically called to their attention by counsel for the Government [T. p. 1262], and there being no evidence of such consent having been given, unquestionably believed that they had no alternative under the Court's final instruction but to bring in a verdict of zero.

In this connection it is to be noted that National City was prohibited by law [Art. 15, Sec. 3 of California Constitution; Calif. Stat. 1923 Chap. 46, Sec. 3; T. pp. 1207-1209] from selling its tidelands taken by these proceedings, yet the Court did not instruct the jury that if they found that National City's tidelands could not be sold that then their verdict for National City should be zero.

Thus two separate property owners rights were submitted at the same time to the same jury for evaluation upon the opinions of the same witnesses. Both owners were prohibited from selling. Yet the Court instructed the jury that if they found that the Tavares Construction Company's lease could not be sold, then their verdict will be zero (1303), but did not give a similar instruction as to National City. Therefore, the jury was free to follow these witnesses' opinions as to values as to National City, but not as to Tavares Construction Company. As a result, their verdict was \$650,000 for National City and \$0 for Tavares Construction Company [T. pp. 1304, 1305].

We submit that the verdict and judgment are not supported by the evidence but are contrary to the evidence, and that the trial has through error resulted in a gross miscarriage of justice.



VII.

**The Verdict and Judgment Are Against Law.**

The Constitution requires that just compensation be paid for the taking of appellants' interests that has been accomplished by this proceeding. This means that appellants were entitled to an award of *something*. That has not been accomplished by a verdict and judgment of *nothing*.

An award of nothing could only be upheld on the basis that appellants had no rights whatsoever or that *nothing* was taken from them by these proceedings.

The Court instructed the jury that if they found that the interest of the Tavares Construction Company and its associates under said instrument of agreement is so speculative and conjectural that no purchaser in the open market would have purchased the same except for a nominal consideration, then their verdict must be in a nominal figure only [T. pp. 1293 and 1301]. But the jury did not award a nominal amount. Instead the jury found that the lease could not be sold and pursuant to the Court's final direction returned a verdict of zero.

Admittedly appellants were in possession of this 100-acre shipyard and engaged in building ships for the Government rent free, when the taking took place. They were there under a valid claim of right recognized as such by the Government. Despite all of the erroneous interpretations placed on appellants' lease by the Government's counsel and witnesses, we submit that that lease in definite

terms gave appellants' certain legal rights, which rights were being enjoyed and had a value. Appellants are entitled to have that value determined, regardless of the fact that they were prohibited by the agreement from selling those rights.

We submit that the verdict and judgment of nothing is contrary to the Fifth Amendment to the Constitution.

### Conclusion.

In conclusion we respectfully submit that the normal method of proceeding to determine just compensation in a condemnation case is to first determine the value of the fee simple estate. Second determine the value of the lessee's estate. Third deduct the value of the lessee's estate from the value of the whole estate, and thereby arrive at the value of the lessor's estate.

In the instant case had the jury been instructed to first determine the value of the shipyard, complete with all the facilities and improvements as of December 23, 1944 and then to deduct therefrom the option price at which the lessee was permitted to purchase the shipyard, the jury could readily have determined the value of the purchase option feature of the leasehold estate.

This shows that exclusive of the value of the possessory rights under the lease, the lessee was entitled to receive as just compensation for the taking of its purchase option the difference between the market value of the shipyard and the option price at which lessee could have purchased the complete shipyard including site, facilities

and machinery as of December 23, 1944 or at any time within the option period as specified.

This measure of determining just compensation would produce in dollars the same award as if lessee were suing for damages for breach of its purchase option contract. As the plaintiff was here seeking to acquire, and did acquire by its declaration of taking and the judgment herein, the purchase option for the very purpose of being relieved from plaintiff's obligations as grantor of said option, it is indeed difficult to see why the measure of just compensation in eminent domain should not be the same as the measure of damages for plaintiff's breach of the option contract.

The loss to the lessee is the same and the rule of reason clearly indicates that the measure of recovery as to the option feature of the leasehold estate should be the same.

Such an instruction by the trial court would have been very simple for the jury to understand, and upon the proof made the jury could have returned a verdict on the merits of the case. Under the instructions as given, the jury was not permitted to decide the question of just compensation, and the matter was by the trial court erroneously reserved for future determination either by the Court of Claims or in some other forum.

We respectfully submit that this proceeding should be remanded to the trial court with instructions:

1. To vacate and set aside the judgment herein insofar as the appellants are concerned.

2. To grant the appellants' Motion for a New Trial,  
and

3. To be governed upon the new trial by the principles  
of law for determining just compensation as set forth in  
appellants' brief.

Respectfully submitted,

JOHN M. MARTIN,

FRANK L. MARTIN, JR.,

*Attorneys for Appellants and Cross-Appellees.*





## In the United States Circuit Court of Appeals for the Ninth Circuit

TAVARES CONSTRUCTION COMPANY, INC., a Corporation, CON-  
CRETE SHIP CONSTRUCTORS, a Joint Venture, STROUD-  
SEABROOK, a Copartnership, LLOYD S. STROUD, R. S.  
SEABROOK, C. M. ELLIOTT, CARLOS TAVARES, HENRY M.  
PAGE and DON F. GATES, *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*,

and

UNITED STATES OF AMERICA, *Appellant*,

v.

TAVARES CONSTRUCTION COMPANY, INC., a Corporation, CON-  
CRETE SHIP CONSTRUCTORS, a Joint Venture, STROUD-  
SEABROOK, a Copartnership, LLOYD S. STROUD, R. S.  
SEABROOK, C. M. ELLIOTT, CARLOS TAVARES, HENRY M.  
PAGE and DON F. GATES, *Appellees*.

Upon Appeals from the District Court of the United States  
for the Southern District of California, Southern Di-  
vision.

### BRIEF FOR THE UNITED STATES.

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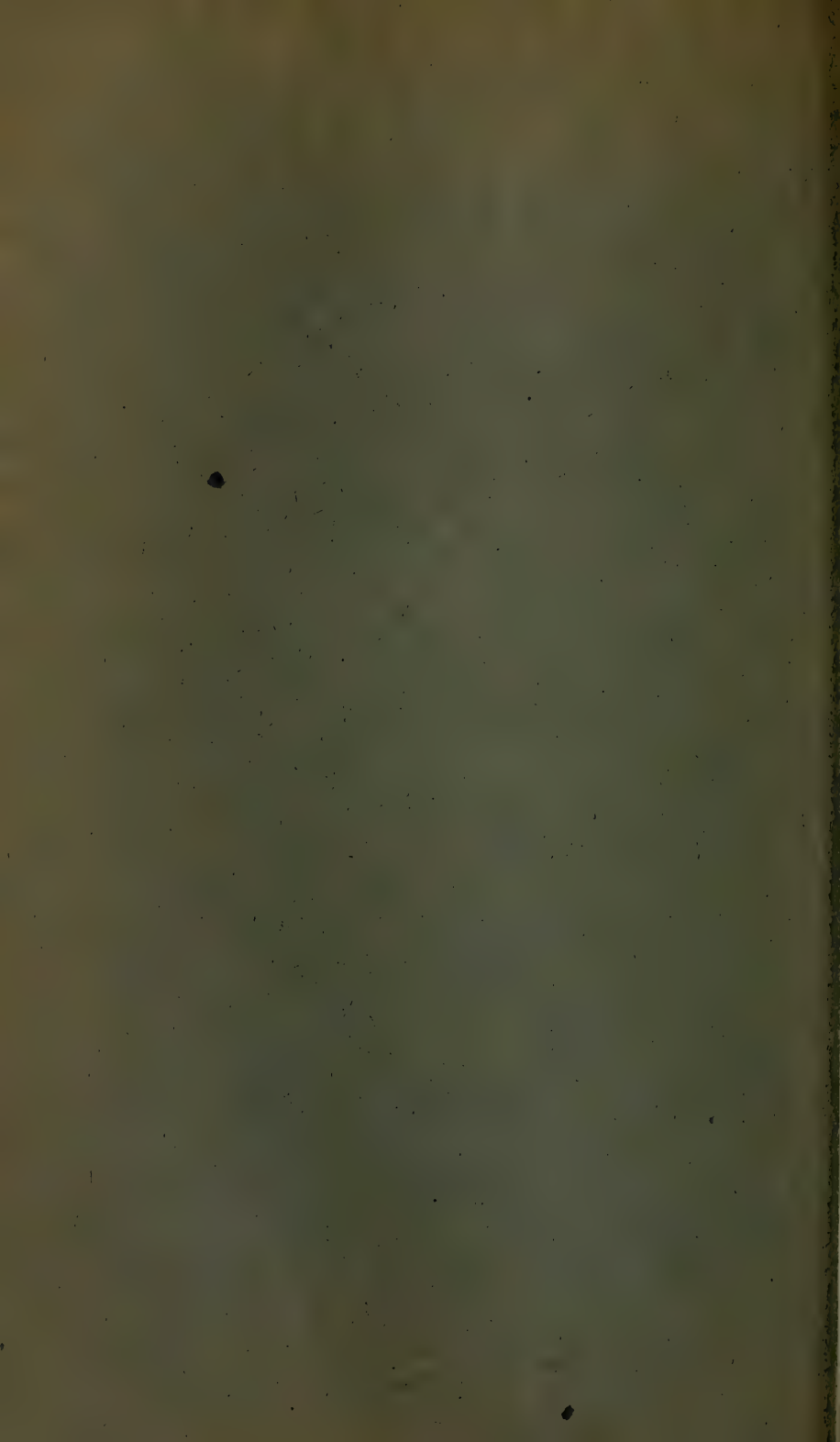
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FILED

JUN 21 1946

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# In the United States Circuit Court of Appeals for the Ninth Circuit

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No. 11,820.

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TAVARES CONSTRUCTION COMPANY, INC., a Corporation, CONCRETE SHIP CONSTRUCTORS, a Joint Venture, STROUD-SEABROOK, a Copartnership, LLOYD S. STROUD, R. S. SEABROOK, C. M. ELLIOTT, CARLOS TAVARES, HENRY M. PAGE and DON F. GATES, *Appellees*.

v.

UNITED STATES OF AMERICA, *Appellee*,

and

UNITED STATES OF AMERICA, *Appellant*,

v.

TAVARES CONSTRUCTION COMPANY, INC., a Corporation, CONCRETE SHIP CONSTRUCTORS, a Joint Venture, STROUD-SEABROOK, a Copartnership, LLOYD S. STROUD, R. S. SEABROOK, C. M. ELLIOTT, CARLOS TAVARES, HENRY M. PAGE and DON F. GATES, *Appellants*,

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Upon Appeals from the District Court of the United States for the Southern District of California, Southern Division.

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## BRIEF FOR THE UNITED STATES.

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### OPINIONS BELOW.

The district court's memorandum entitled "Ruling on Pre-Trial" (R. 307-309) has not been reported. The district court wrote no opinion in connection with its final judgment entered June 6, 1947. Its oral opinion (R. 1428-1448) pursuant to which it ordered the judgment modified and corrected (R. 1459) has not been reported.

## **JURISDICTION.**

These are appeals in an eminent domain proceeding brought by the United States (R. 2). From the final judgment entered June 6, 1947 (R. 311-330), appealing condemnees filed their notice of appeal on August 26, 1947 (R. 367). From an order entered December 2, 1947, correcting and modifying the judgment (R. 1459), the United States filed its notice of appeal on March 1, 1948 (R. 1460-1461). The jurisdiction of the district court over the proceeding rests on the Act of August 1, 1888, 40 U. S. C. sec. 257, and the Second War Powers Act, 56 Stat. 176, 50 U. S. C. App. secs. 631-645b (R. 6). Jurisdiction of the district court to correct and modify the judgment was sought to be invoked under Rules 60, 75 (h) and 81 (7), Federal Rules of Civil Procedure, and Section 473, California Code of Civil Procedure (R. 382). Jurisdiction of this Court is invoked under Section 128 of the Judicial Code, as amended, 28 U. S. C. sec. 225(a).

## **QUESTIONS PRESENTED.**

### **Appeal of Tavares Construction Company, Inc., et al.**

1. Whether the issue of just compensation for appellants' option to purchase the property from the United States was presented, tried and determined in this proceeding.
2. Whether there was reversible error in the trial court's instructions, to which no objection was made, on how appellants' compensation should be determined.
3. Whether it was reversible error to let the United States impeach appellants' evidence by showing an unqualified admission of fact made by appellants in an offer of compromise.
4. Whether there was reversible error in the Government's argument to the jury, to which no objection was made.
5. Whether there was reversible error in the trial court's failure to instruct the jury on the legal effect of appellants' lease and option agreement, when no such instruction was requested.

6. Whether the verdict and judgment are supported by evidence.

7. Whether there was prejudicial error in awarding appellants nothing rather than nominal damages.

### **Appeal of the United States.**

1. Whether the trial court erred or exceeded its jurisdiction when, after appeal had been taken from the final judgment, it ordered that the judgment be modified to exclude appellants' option to purchase the property condemned.

### **STATEMENT.**

Concurrently with the acquisition of an interest in the property here being condemned, the United States gave to appellants a lease of the property, coupled with a purchase option. After filing its original petition herein to condemn the fee simple title, the United States filed an amended and supplemental complaint to take in addition the interests granted to appellants by the lease. The fundamental issue on these appeals is whether the compensation payable for the taking of such interest was correctly determined. Stated more fully, the material facts are as follows:

On November 27, 1941, Concrete Ship Constructors entered into a contract with the United States Maritime Commission (R. 97-128) to construct concrete barges at National City, California, in a yard to be furnished by the contractor and financed by the Defense Plant Corporation (R. 99). On December 27, 1941, the Tavares Construction Company<sup>1</sup> entered into an agreement with Defense Plant Corporation regarding the yard to be used. That agreement, known as "Plancor-407" (R. 49-67, admitted as Ex. W, R. 696-697) provided that the Tavares Company, having or being about to secure a lease of a six-acre tract

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<sup>1</sup> All the rights of the Tavares Construction Company were held in trust for the benefit of Concrete Ship Constructors, a joint venture comprising the Tavares Company and its other co-appellants. For the purposes of this appeal it is unnecessary to distinguish between those parties, and they are generally referred to collectively as the Tavares Construction Company in the Record and in appellants' brief (cf. R. 660, 681; Appellants' Br. 10).



of harbor land in National City, would assign that lease to Defense Corporation and would construct shipyard facilities on the property at the expense of Defense Corporation, the cost to Defense Corporation not to exceed \$404,500 nor include executive salaries or overhead except direct expenses approved by Defense Corporation. The agreement provided that Defense Corporation subleased the site and leased the facilities to the Tavares Company for a term ending December 31, 1947, to be automatically extended to December 31, 1949, to be used for construction of boats for the Government but not for other purposes without permission; that the Tavares Company would pay for insurance, taxes and utilities and would pay as rent \$83,327 for each boat delivered to the United States until Defense Corporation was reimbursed for the cost of the yard, after which no rent was to be paid. Paragraph 12 provided that either party could terminate the lease by giving notice that the Tavares Company no longer needed substantial use of the yard for construction of boats for the United States. Paragraph 14 gave to Defense Corporation the right to cancel the lease if (a) substantially all of the Tavares Company's shipbuilding contracts with the United States were terminated or canceled,<sup>2</sup> or (b) the United States was refused priority with respect to use of the facilities, or (c) the Tavares Company became insolvent, or (d) the Tavares Company violated terms of the lease. If the lease expired or was terminated under paragraph 12 or 14 (a), the Tavares Company was given for 90 days the privilege of negotiating for the purchase or lease of part or all of the facilities and machinery and the option to buy the entire site, facilities and machinery for the then-unreimbursed cost or cost less depreciation, whichever was greater, and for another 90 days the privilege (if it could lawfully be given) of meeting any offer for the purchase of part or all of the facilities and machinery. The agreement further provided that Defense Corporation could transfer the lease to another branch of the Government, but the Tavares Company could not sublease or assign its rights without permission.

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<sup>2</sup> Those contracts could all be canceled by the Maritime Commission at any time (R. 124, 163-164, 215).

On January 1, 1942, the Tavares Company secured a lease (R. 129-134) from the City of National City covering an 18-acre tract (designated parcel 1 in the present proceeding; R. 6), and assigned the lease to Defense Corporation (R. 134-135) pursuant to their agreement.<sup>3</sup>

Plancor-407 was amended on April 13, July 1, July 29, and August 12, 1942 (R. 68, 72, 77, 81), to increase the permissible cost of the facilities and the rent to be paid. The Tavares Company was given contracts for additional boats on June 30, 1942 (R. 186-220), and October 26, 1943 (R. 136-172), and a larger yard became necessary. The original petition in the present case was filed November 10, 1942, at the request of the Chairman of the Maritime Commission, to condemn in fee simple the original yard (parcel 1) and ten additional parcels, numbered 2 to 11 (R. 2-17). On the same day an order was entered for possession of parcels 4 and 5 after 30 days and for immediate possession of the other parcels (R. 21-23). On the following day Plancor-407 was again amended to increase the permissible cost of the properties and the rent, and to add the condemnation award, when determined, to the permissible cost, to the total rent, and to the option price (R. 86-91). Rent and permissible cost were again increased on March 9, 1943 (R. 92-96).

On October 3, 1944, a declaration of taking as to parcels A<sup>4</sup> and 2 to 11, inclusive, was filed (R. 28-34) and judgment entered thereon (R. 35-41). On December 23, 1944, an amended declaration of taking was filed which included parcel 1 (R. 42-48). Judgment on the amended declaration of taking was entered December 27, 1944 (R. 242-248).

On January 15, 1945, the United States filed an amended and supplemental complaint, to take all interests in the property except those of the United States and Defense Plant Corporation (R. 249-258). On motion of appellants

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<sup>3</sup> A lease of six of these 18 acres had previously been given by National City to the Allied Engineering and Shipbuilding Company which in turn had assigned it to the Tavares Company (R. 278, 875-876, 900).

<sup>4</sup> On September 23, 1944, the petition had been amended to include a twelfth piece of land, designated Parcel A (R. 24-26) and an order for immediate possession of it was entered (R. 27).

(R. 259-264) the United States was ordered (R. 265) to file a bill of particulars, which it did on April 16, 1945 (R. 266-267), stating that it sought to take all the interest of appellants in the property.

On October 4, 1946, the parties filed a joint pre-trial memorandum submitting to the court the questions of whether the lease and option rights of appellants under Plancor-407 were taken in this action, and whether appellants had a compensable interest in the property (R. 301-306). On October 10, 1946, Judge Yankwich filed his pre-trial ruling answering both questions in the affirmative (R. 307-309), and on February 5, 1947, his order to the same effect (R. 310). The latter order also approved a stipulation of the parties (R. 278-300) as to certain facts.

The case was tried before Judge McCormick sitting with a jury, February 17 through 27, 1947 (R. 392-1305). At the trial it was stipulated that the Tavares Company's lease coupled with an option was taken by the United States on December 23, 1944 (R. 401).

The fee title to the tidelands here involved was held by the City of National City under legislative grant from the State of California which carried the provision that they should never be conveyed away, and if conveyed would revert to the State (R. 406-407). The State conceded that one dollar would be just compensation for its interest in the tidelands, but objected to the taking on the ground that it was for the purpose of giving a purchase option to the Tavares Company, which the State argued was not a public purpose. It was thereupon pointed out on behalf of the Tavares Company that the objection was obviated by the fact that by the amended and supplemental complaint the purchase option given to the Tavares Company was also being condemned by the United States (R. 410-414). The court indicated that it would request the State to present its views if it became necessary to consider the question (R. 414-415). No such request was ever made.

Pursuant to ruling of the court (R. 438, 444) the burden of going forward was taken by the defendants, first the fee owners Carl and Pearl Johnson as to Parcel 9 (R. 452-490) and National City as to Parcels 1, 2, 3, 5, 6, 7, 8 and A (R. 491-596), then the lessees San Francisco Bridge Company as to Parcel 7 and part of Parcel A (R. 597-660) and appellants as to all parcels (R. 660-922). The court



allowed all parties to stipulate that adverse rulings should be deemed excepted to (R. 462-463).

National City, in presenting its evidence, faced the difficulty of proving the "market value" of its tidelands which the state law provided could not be sold (R. 491-492). That difficulty was met by introducing testimony as to what would have been the market value of the land if it could have been sold (R. 534, 536, 553, 557, 561-562, 579).

At the commencement of appellants' case, their counsel indicated that they regarded their purchase option as part of the interest taken by the United States and to be evaluated in this proceeding (R. 663-664). Appellants informed the court that they intended to offer evidence of the value of the services rendered by them as consideration for their rights under the agreement, conceding that it had nothing to do with the normal measure of compensation or market value of their rights but contending that where the United States condemns rights under a contract with itself, it must pay at least as much as the consideration given for the rights, or the amount that could have been recovered in the Court of Claims in an action for breach of the contract (R. 698-701). The court stated that appellants would not be allowed to show what they could have recovered in a suit for breach in the Court of Claims, but that the case would be submitted to the jury on the theory that the jury should fix just compensation (R. 701-702). In connection with offers in evidence of portions of the pre-trial stipulation and agreed statement of facts, the court stated that, in valuing the option, occurrences and agreements between the parties subsequent to December 23, 1944, should be excluded from consideration as irrelevant. So far as they might afford basis for recovery for breach or frustration, the court indicated that they could only be litigated in the Court of Claims (R. 725-727).

For appellants, five witnesses testified as to the value of appellants' rights under the agreement, valuing them at \$750,000 (Tavares, R. 748), \$600,000 (Hotchkiss, R. 802), \$500,000 (Anewalt, R. 831), \$573,000 (Bleifuss, R. 869) and \$500,000 (Mueller, R. 881), respectively. Each of these witnesses stated that he included the option in valuing appellants' contract rights (R. 747-748, 750, 757; 802, 810, 813, 818-819; 833, 835, 843; 870; 887, 893-894). Neither Mr. Tavares nor Mr. Anewalt made any allocation of value



between the lease and the option (R. 776, 843). Mr. Mueller testified that the option was worth \$500,000 and the lease itself was worthless (R. 881, 901). Mr. Anewalt justified his appraisal by stating that appellants' profits had amounted to \$1,000,000 a year (R. 851). The United States maintained a continuous objection to appellants' testimony, on the ground, among others, that a purchase option was not such an interest in the property as to be compensable in eminent domain. That objection was consistently overruled on the ground that the court would not deviate from the pre-trial ruling that the option was taken and compensable in this proceeding (R. 745-747, 781, 802, 830-831, 869, 881; cf. R. 1395-1398).

Mr. Tavares testified that a minimum fee for appellants' supervisory services in constructing the shipyard facilities would have been 10% of cost plus 2% for designing and engineering services (R. 741). On cross-examination the United States introduced, solely as impeachment of that testimony (R. 788), a statement by appellants that a minimum supervisory fee would have been 3%, or \$80,000 (R. 770-771). Appellants' objection that the statement was inadmissible because contained in an offer of compromise was overruled (R. 769).

With the approval of the court, it was stipulated that the price that appellants would have had to pay under their option, as of December 23, 1944, was \$2,141,236.49 as shown by appellants' Exhibit Q (R. 652-658, 1305-1333).

For the United States, Mr. Shattuck and Mr. Mason testified that the lease and option had no market value because the lease tenure was subject to many doubts and uncertainties, and because the purchase price called for by the option was greatly in excess of the value of the property (R. 1111-1117, 1132-1140, 1150-1153, 1160, 1175, 1180, 1199-1200, 1202, 1205).

Witnesses both for appellants (R. 749, 798-801, 832-835, 870, 884-889) and for the United States (R. 1097-1104, 1114-1117, 1169-1171) in testifying as to the value of appellants' rights under the lease and option agreement explained what they understood those rights to be. That practice was initiated by appellants, and no objection was made to it at any time. Although appellants' interest under the lease could not be transferred without consent of the United States (R. 64), all the valuation witnesses

assumed a transfer, for the purpose of determining "market value" (R. 774, 816, 851, 869, 907, 1095-1096, 1200).

The court's instructions to the jury included the following:

(As to the National City interest:) The real question for your determination is the market value of the property at the time of the taking ( R. 1284).

You should give no consideration whatever to the willingness or unwillingness of any or all of these defendants to have the Government take this land or any interest therein, if any such there be. \* \* \* Market value does not depend in any degree upon the owner's will (R. 1285).

You will likewise disregard any agreements between the state and the city limiting the uses (R. 1286).

(As to appellants' interest:) The interest of the Tavares Construction Company and its associates arises out of an instrument which is in evidence as defendants' Exhibit W, an agreement entered into between Tavares Construction Company and the Defense Plant Corporation; you are to determine what is the fair market value of the interest arising out of such instrument, to wit, what is the amount for which the interest of said Tavares Construction Company and its associates under said instrument of agreement could have been sold for on the open market for cash on December 23, 1944, the date it was taken or cancelled by this proceeding or within a reasonable time thereafter; and in this connection if you find that the interest of the Tavares Construction Company and its associates under said instrument of agreement is so speculative and conjectural that no purchaser in the open market would have purchased the same except for a nominal consideration then your verdict as to the interest of the Tavares Construction Company and the Concrete Ship Constructors herein must be in a nominal figure only. You are to take into consideration the terms and conditions of the whole of said agreement and are to consider what effect, if any, a willing seller and a willing buyer would give to all of the terms and conditions of said agreement with Defense Plant Corporation in arriving at a determination as to the price for which the interest of said Tavares Construction Company and its associates under said instrument of agreement would bring at such sale (R. 1293).

In arriving at the amount of such award, if any, for Tavares Construction Company, Inc., that you are also instructed to take into consideration the option rights of Tavares Construction Company, Inc. to purchase the entire shipyard site, facilities and machinery \* \* \* (R. 1294).

Evidence has been received in this case with relation to the interest of the defendant, Tavares Construction Company, Inc. That interest arises out of an instrument which is in evidence as Defendants' Exhibit W. That instrument is a lease coupled with an option. In your consideration of that feature of the case you will proceed in the same manner as you proceed as to the market value of the land, the question being what could it have been sold for on the open market for cash on December 23, 1944, the date it was taken or canceled by this proceeding, or shortly thereafter, above what Tavares Construction Company, Inc. would have to have paid under all its terms and conditions. If you find the company could have made such a sale your verdict will be for the amount you in your judgment determine the company could have gotten for it. You will consider the entire instrument, not just parts of it. If you find it could not have been sold, then your verdict as to Tavares Construction Company, Inc. will be zero (R. 1295-1296).

At the close of the charge, the court asked for exceptions (R. 1296). Appellants took none. After the jury had retired, it asked to have the instructions as to appellants' interest repeated, which was then done (R. 1300-1303).

The jury returned its verdict awarding \$6,750 for the Johnson property and \$650,000 for the National City property, of which latter \$50,000 was allocated to the San Francisco Bridge Company lease. The jury awarded to appellants, "for the condemnation and taking of all their interests under the agreement of December 27, 1941, (known as Plancor 407, as amended) \$0" (R. 1304-1305). The court entered judgment on the verdict June 6, 1947 (R. 311-330), awarding appellants nothing for the "taking by plaintiff of all right, title, and interest" of appellants "in and to the real property \* \* \* and the option, leasehold and possessory rights \* \* \*" (R. 327).

On June 6, 1947, appellants filed their motion for new trial (R. 331-358), which was heard on the same day (R.



1334-1417). All but the first of the contentions raised by appellants in this Court were there presented. At the hearing the court pointed out, among other things, that appellants had made no response to the court's inquiry whether there were objections to the instructions (R. 1374-1378), and that the court had felt bound to follow and had followed Judge Yankwich's pre-trial ruling that the option was compensable but that did not necessarily mean that it was to be compensated for if the jury found that it had no value (R. 1395-1398). New trial was denied on July 29, 1947 (R. 366), and on August 26, 1947, notice of appeal was filed (R. 367).

Thereafter, on November 18, 1947, appellants filed their notice of motion to correct and modify the judgment (R. 381-382). The motion was heard on December 2, 1947 (R. 389, 1418-1448, 1459). The United States opposed the motion on the grounds that the judgment was correct as entered (R. 1420-1421), and that the court was without jurisdiction to modify the judgment after an appeal had been taken (R. 1423-1424). However, the court ordered the judgment amended in conformity with its opinion given orally at the hearing, so as to strike the word "option" from the description of the interests taken from appellants and compensated for in this proceeding (R. 1436-1445). That was done on the ground that it had been included by inadvertence and did not reflect the judgment of the court (R. 1437, 1445). The United States excepted to that order (R. 1446) and filed its notice of appeal therefrom on March 1, 1948 (R. 1460-1461). Pursuant to stipulation of the parties (R. 1463-1465), this Court ordered consolidation of the appeals (R. 1465).

### **SPECIFICATION OF ERRORS, ON APPEAL BY THE UNITED STATES FROM ORDER MODIFYING JUDGMENT.**

1. The district court erred in making its order of December 2, 1947.
2. The district court lacked jurisdiction to amend the judgment entered June 6, 1947.
3. The district court erred in concluding that the questions as to compensation for the option had not been considered or decided at the trial of the case.



4. The district court erred in granting the motion of November 17, 1947, to correct and modify the record and judgment.

5. The district court erred in holding that the verdict did not include compensation for the option.

## **SUMMARY OF ARGUMENT.**

### **Appeal from the Judgment.**

The court ruled on pre-trial that appellants' purchase option under the agreement of December 27, 1941, was part of their interest in the property taken and compensable herein. That view was adhered to by the court during the trial, in instructing the jury, and on the motion for new trial. All parties so understood and all valuation testimony included the option as well as the lease. Since the option was so included in the valuation, it is unnecessary to consider appellants' contention that its exclusion would have been error.

The trial court correctly instructed the jury that appellants' compensation should be the market value, if any, of their interest, disregarding the restrictions to which it was subject. Since the jury returned a substantial verdict in favor of National City for its inalienable interest in the property, and the jury was instructed to proceed in the same way in valuing all interests, the verdict of zero in favor of appellants cannot be attributed to any misunderstanding by the jury to the effect that appellants' interest could not have a "market value" because it was transferable only on consent of the lessor. Rather, it must be attributed to acceptance of the Government's evidence that appellants' interest had no value even if alienable. In any event, appellants preserved no objection to the instructions.

The trial court did not err in allowing the United States to rebut appellants' evidence as to the value of the consideration given by them for their lease agreement by introducing an inconsistent admission made by appellants in an offer of compromise. An admission against interest, as distinguished from a mere compromise offer, may be put in evidence against the party making it even if contained in an offer of compromise.

The Government's argument to the jury was supported by the record and was not prejudicial. In the absence of motion for mistrial, objection, or request for admonition to the jury, it could afford no ground for appeal. Appellants' present contention regarding it was argued to the trial court on motion for new trial, which was denied. That exercise of discretion by the trial court should not be reviewed on appeal.

Witnesses for both sides as to the value of appellants' rights under the lease testified as to their understanding of the effect of the lease. That was necessary to an intelligent weighing of their testimony. If error, it was invited by appellants, who opened up that line of inquiry. The market value of the lease depended on its appeal to prospective buyers, not on its correct legal construction. Its true legal effect was not in issue, and no instruction regarding it was requested.

The verdict and judgment are supported by evidence and are not contrary to law. The error, if any, in awarding nothing rather than nominal compensation, is not prejudicial.

### **Appeal from the Order Modifying the Judgment.**

The judgment as originally entered correctly reflected the issues tried, including compensation for appellants' purchase option. The order that the option be stricken from the judgment was erroneous. It was not a correction of a clerical error and, being made after appeal had been taken from the judgment, it was beyond the court's jurisdiction.

### **ARGUMENT.**

Appellants' third point on appeal is based on the overruling of their objection to evidence offered by the United States. With that exception, the points urged by them were not preserved in the trial court by offer of proof, objection, request for instruction, or otherwise, and therefore properly present nothing for review by this Court. *Atlantic Brewing Co. v. William J. Brennan Grocery Co.*, 79 F. 2d 45, 47 (C. C. A. 8, 1935).

For purposes of clarity, this brief will discuss appellants' points both as to substance and procedure in the order in which they are presented in their brief.

## I.

**The Issue of Just Compensation for Appellants' Purchase Option Was Tried and Determined in This Proceeding.**

Appellants' first point on appeal is that the trial court was in error in holding that it was without power to award compensation for appellants' option to purchase the property condemned (Br. 10-22). But the trial court never held that it was without power to award compensation for appellants' option. Its only holding excluding the option from the case was made on appellants' own motion (R. 381), after entry of the judgment here appealed from and in fact after this appeal was taken. At that time, over the protest of the United States, the trial court ordered the judgment modified to omit the option from the interests covered by the judgment (R. 1418-1448, 1459). The United States has appealed from that order (R. 1460). Throughout the trial and up to the time that order was entered, the trial court consistently held, over the repeated objection of the United States, that the option was included in the interests taken and compensable herein. All witnesses testified on that basis, and the jury was instructed to include the value of the option in its award. The judgment, as originally entered and appealed from, expressly included the option.

An examination of the record shows that appellants' contrary assertion is unfounded. On October 4, 1946, before the trial, appellants and the United States filed a joint memorandum on pre-trial, submitting to the court the questions:

(a) Have the lease and option rights of Tavares Construction Company, granted under the "Agreement of Lease" dated December 27, 1941, and by the supplements thereto, been taken and condemned by this action?

(b) Does the defendant, Tavares Construction Company, have a compensable interest in the property taken by the condemnation proceeding? (R. 301-306.)

By ruling filed October 10, 1946 (R. 307-309), and order filed February 5, 1947 (R. 310), the court answered both questions in the affirmative. In its ruling the court said, "The existence of the option is a matter to be considered

by experts in determining the value of the property taken'' (R. 309).

At the trial appellants adduced five witnesses as to the value of their rights under the lease and option agreement (R. 718-777, 748; 796-827, 802; 828-866, 831; 867-879, 869; 880-922, 881). All of them testified that they included the option in valuing appellants' interest in the property (R. 747-748, 750, 757; 802, 810, 813, 818-819; 833, 835, 843; 870; 887, 893-894). Two of them, Mr. Tavares and Mr. Anewalt, testified that they made no allocation of value between the lease and option (R. 776, 843). Another, Mr. Mueller, testified that all the value was in the option, that the lease itself had none (R. 901). To the testimony of each of appellants' valuation witnesses the United States objected on the ground, among others, that an option was not such an interest in property as to be compensable in eminent domain. That objection was invariably overruled, the court stating that it would not review the pre-trial ruling on the point (R. 745-747, 781, 802, 830-831, 869, 881; cf. R. 1395-1398). Without waiving its objection (R. 1090), the United States also introduced evidence as to the value of the option along with the lease. Its evidence was that the value of both was zero (R. 1099-1101, 1113, 1116, 1139; 1170, 1175, 1203). The court explicitly instructed the jury to consider the option in valuing appellants' rights under the contract (R. 1294) and to "consider the entire instrument, not just parts of it" (R. 1295). Those instructions were afterward repeated at the jury's request (R. 1302-1303). The verdict, as to appellants, was for the "taking of all their interests under the agreement" (R. 1305) <sup>5</sup> and the judgment entered thereon was for the "taking by plaintiff of all right, title and interest" of appellants "in and to the real property \* \* \* and the option, leasehold and possessory rights \* \* \*" (R. 327). In the face of such a record there is clearly no justification for appellants' contention that the trial court "indicated throughout the trial of these proceedings below that it was of the conviction that a United States District Court was not the proper forum to award the Tavares Construction Company compensation" for the taking of its option (Br. 11).

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<sup>5</sup> Appellants made no objection to the form of the verdict when it was proposed or when it was submitted to the jury (R. 1228-1231, 1296).



Appellants' present contention that the court excluded the option from the issues at the trial rests on a misconstruction of two rulings of the court. The first occurred when appellants proposed to introduce evidence of the value of the services rendered by them under the lease agreement, on the theory that that represented the minimum compensation to which they were entitled when their rights under the agreement were condemned, because it was what they could have recovered in the Court of Claims if the United States, instead of condemning the agreement, had breached it and appellants had sued in the Court of Claims for the breach (R. 698-699). The court stated that the issue was just compensation for the taking, and that appellants would not be allowed to show what their recovery might have been in a Court of Claims suit (R. 701-702). That statement was plainly correct.<sup>6</sup> Moreover, it presents nothing for review since it was not a ruling excluding any evidence actually offered by appellant at that time (R. 700). Indeed, the United States said it would not object to evidence as to the fair value of the supervisory fee (R. 700) and such evidence was later introduced by appellants (R. 741).

The second ruling now claimed by appellants to have excluded the option from the issues was in fact no more than a ruling that appellants could not litigate in this condemnation case any claims that they might have against the United States, arising subsequent to the date of taking (R. 725, 727). That ruling was made in accordance with appellants' own contention, stated by their counsel as follows:

Our theory is that there is a deadline, that there was a deadline, of December 23, 1944, the date when the government took, by operation of law, our leasehold estate, and as to this lawsuit I am limited to the market value of that (R. 725).

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<sup>6</sup> Whatever appellants' rights might have been if there had been a breach of the agreement by the United States, it is clear that just compensation in eminent domain is not to be measured by the consideration that the condemnee gave in acquiring the condemned property. He may have made a good bargain, in which case the United States cannot deprive him of its benefits; he may have made a poor bargain, in which case the United States cannot be required to bear the burden of his poor judgment. *United States ex rel. T. V. A. v. Powelson*, 319 U. S. 266, 285 (1943); *Olson v. United States*, 292 U. S. 246, 255 (1934); *Brooks-Scanlon Corp. v. United States*, 265 U. S. 106, 123 (1924).

Since the ruling exactly conformed to appellants' own contention there advanced, they are in no position now to complain of it. Moreover, the ruling was plainly correct. No rule is better settled than that the rights of the parties in a condemnation proceeding are fixed as of the date of taking. *United States v. Miller*, 317 U. S. 369, 374 (1943). The court's ruling related only to suppositious occurrences after the date of taking; it in no way suggests that any particular rights were or were not taken. In fact, the court said, "When it comes to the question of value of the option, it seems to me that the case can be simplified by the optionee preserving in the Court of Claims anything subsequent to the date of the termination of the project. \* \* \* Anything that comes within the period up to December 23, 1944, is a relevant matter to this case" (R. 725). The court was clearly laying down rules to be followed in valuing the option, and was not, as appellants now contend, holding that the option could not be valued at all in this proceeding.

The fact that appellants, immediately after the foregoing rulings, introduced their evidence as to the value of the option, and that the court admitted it over the Government's objection that the option was not a compensable interest, shows that the rulings were not intended by the court or understood by appellants as excluding the option from the case. On their face they are not susceptible of such interpretation. The court submitted the case to the jury with explicit and repeated instructions to include the value of the option in their award. It was not until after the jury returned its verdict awarding appellants nothing for their interests that appellants suggested that the option had not been included in the trial. The suggestion is at variance with the plain facts, and is no more than a belated attempt to salvage for future re-litigation a claim that was litigated in the present proceedings at appellants' insistence and was determined in a manner not to their liking.

Since the option was included in the valuation, it is unnecessary to consider appellants' contention that its exclusion would have been error.<sup>7</sup>

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<sup>7</sup> Upon this question see *East Bay Mun. Utility Dist. v. Kieffer*, 99 Cal. App. 240, 246, 278 Pac. 476, 279 Pac. 178 (1929), citing *Matter of City of New York (Upper N. Y. Bay)*, 246 N. Y. 1, 30-34, 157 N. E. 911 (1927), certiorari denied, 276 U. S. 626 (1928). Although

## II.

**The Trial Court Did Not Err in Instructing the Jury How to Determine Appellants' Compensation.**

Appellants argue (Br. 23-48) that the trial court erred in its instructions to the jury as to how appellants' compensation, if any, should be determined. After giving the charge, the court asked if there were any exceptions (R. 1296) and appellants made no objection, either then or when the charge as to their compensation was later repeated, in the presence of appellants' counsel (R. 1300), at the jury's request (R. 1300-1303). Appellants now contend that they can challenge the instructions in this Court without having done so below, because that right is given by section 647 of the California Code of Civil Procedure, and the procedure in federal condemnation proceedings is required to conform to local law. General Condemnation Act of August 1, 1888, 40 U. S. C. sec. 258. Appellants are mistaken as to the scope and effect of the conformity provisions. It has uniformly been held that such provisions do not include the manner of preserving objections for the purposes of appeal, and that regardless of local practice a federal appellate court will not review action of a trial court if no objection was preserved at the trial. *United States v. United States Fidelity Co.*, 236 U. S. 512, 529 (1915) (General Conformity Act, 28 U. S. C. sec. 724); *Grand River Dam Authority v. Thompson*, 118 F. 2d 242 (C. C. A. 10, 1941) (conformity provision for eminent domain proceedings under the Federal Power Act, 16 U. S. C. sec. 814). The conformity provisions of the General Condemnation Act here involved are not distinguishable from those construed in the cited cases. Cf. *Comparet v. United States*, 164 F. 2d 452 (C. C. A. 10, 1947). This Court has held, in cases arising in California under the General Conformity Act, that failure to object to instructions at the trial precluded a review of them on appeal. *Fidelity & Casualty Co. of New York v. Griner*, 44 F. 2d 706, 708 (1930); *Radius v. Travelers Ins. Co.*, 87 F. 2d 412, 415 (1937). Not having preserved objections to the

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the meaning of "property" as used in the Fifth Amendment is a federal question, it will normally obtain its content by reference to local law. *United States ex rel. T. V. A. v. Powelson*, 319 U. S. 266, 279 (1943).



instructions, appellants are not entitled to attack them on appeal.

Appellants' contention is equally unsound on its merits. It is their theory that the trial court in effect charged the jury that if appellants' interest in the property was not transferable then no compensation should be allowed for it. They argue at length that such is not the law. That may be conceded. However, the United States does not concede that such an instruction was given, or was understood by the jury to have been given, or if it had been given, could have had any effect on the verdict under the evidence.

The instruction to which appellants object was as follows:

Evidence has been received in this case with relation to the interest of the defendant, Tavares Construction Company, Inc. That interest arises out of an instrument which is in evidence as Defendants' Exhibit W. That instrument is a lease coupled with an option. In your consideration of that feature of the case you will proceed in the same manner as you proceed as to the market value of the land, the question being what could it have been sold for on the open market for cash on December 23, 1944, the date it was taken or canceled by this proceeding, or shortly thereafter, above what Tavares Construction Company, Inc. would have to have paid under all its terms and conditions. If you find the company could have made such a sale your verdict will be for the amount you in your judgment determine the company could have gotten for it. You will consider the entire instrument, not just parts of it. If you find it could not have been sold, then your verdict as to Tavares Construction Company, Inc. will be zero (R. 1295-1296).

The agreement which created appellants' interest in the property provided that it could not be transferred without the consent of Defense Plant Corporation and the Maritime Commission (R. 64). Appellants argue that in view of this provision the single sentence "If you find it could not have been sold, then your verdict as to Tavares Construction Company, Inc. will be zero" in effect directed a zero verdict (Br. 34). It cannot be so understood. The form of the verdict submitted to the jury (R. 1296), which pro-



vided a place for an award to appellants, demonstrates the error of appellants' contention that the quoted sentence "was nothing more than a direction by the court to award nothing to the Tavares Construction Company \* \* \*" (Br. 34). The quoted paragraph, as a whole, plainly deals only with the question of how much an assumed buyer would have paid. The court said, "The question being what could it have been sold for \* \* \* above what Tavares Construction Company, Inc. would have to have paid under all its terms and conditions. If you find the company could have made such a sale" (i. e., a sale for a sum above the payments called for by the agreement) "your verdict will be for the amount you in your judgment determine the company could have gotten for it." In such a context, the direction to award nothing if it could not have been sold plainly meant, if no buyer would have paid anything for it.

That this was the true meaning is made perfectly plain by the instruction to "proceed in the same manner as you proceed as to the market value of the land" (R. 1295). Most of the land was owned by National City under a legislative grant which made it strictly inalienable. Cal. Stats. 1923, c. 46 (R. 491-492, 1209). Nevertheless all witnesses as to its value assumed its marketability (R. 534, 536, 553, 561, 579, 962, 1027, 1087), and the court instructed the jury in fixing its market value to disregard any agreements between the state and the city limiting its uses (R. 1286). The instruction to proceed in the same manner as to appellants' interest necessarily incorporated this charge along with the rest of the court's definition of market value.

The National City property was strictly inalienable, yet all witnesses agreed that it had market value (R. 536, 554, 580, 944, 1024, 1089) and the court gave no instruction to the jury concerning the possibility that it could not be sold. Appellants' property, on the other hand, was not inalienable but was only subject to the requirement that sales be consented to by the Government, and there was evidence in the record that such consent could probably have been secured (R. 774). There was no testimony that appellants' interest lacked market value because it was inalienable; there was testimony that it had no market value because the lease was subject to many contingencies and uncertainties and the option called for a price far in excess of the value of the

property (R. 1111-1117, 1199-1200). On such a record, the instruction, confined to appellants' interest only, to award nothing if it could not be sold, obviously referred only to the possibility that it would not be attractive to buyers. That it was so understood by the jury is clearly shown by the fact that a substantial verdict was returned in favor of National City (R. 321, 1304), although the instruction was that the jury should proceed "in the same manner" in valuing both interests. Even if the jury had understood the instruction to mean that the award should be zero if appellants' interest was inalienable, that could not have affected the verdict because, as already pointed out, appellants' interest was not inalienable.

Appellants' statement (Br. 35) that the United States sought throughout the proceedings to prove that the rights of appellants were inalienable is not true. Of course an interest that is freely transferable is more desirable and to that extent more valuable than one that is not. In that sense the witnesses for the United States did consider the restrictions on assignment as one element affecting value (R. 1102, 1173). However, in determining how much appellants' interest could be sold for, they both assumed a sale (R. 1095, 1200). That is to say, they determined how much a willing buyer would pay to secure, and how much a willing seller would accept to give up, an interest of restricted alienability such as appellants had. That is precisely the usual and proper measure of compensation; appellants' attempt to read into it an inconsistent and confiscatory theory of compensation is not justified by the record.

It is thus clear that appellants' attack upon the instruction to the jury and upon the method of valuation adopted by the trial court is unwarranted in view of the record. Moreover, we submit that the alternative method of valuation suggested for the first time in appellants' brief here is unsound. The suggestion is (Br. 40-48) that the proper procedure at the trial would have been to award the value of the undivided fee as of the date of taking appellants' interest, and then to apportion the award between appellants and Defense Plant Corporation, giving to Defense Plant Corporation the amount of its option price and to appellants the

remainder of the award (Br. 47). Appellants are of course correct in stating that the proper procedure is to value condemned property as a whole and then to apportion that award among the condemnees in proportion to their interests in the property. However, in arguing that this rule requires unit valuation of their interest and that of Defense Plant Corporation in the present case, they overlook the fact that the interest of Defense Plant Corporation was not included in the condemnation but was expressly excepted therefrom (R. 254). No procedural rule could justify, much less require, a court in condemnation to determine and distribute compensation for property outside the scope of the taking. The evaluation of a leasehold apart from the fee is no "insuperable task" as appellants suggest (Br. 43), but has on the contrary been successfully accomplished in some hundreds of cases in which the United States has condemned leasehold interests. See e. g., *United States v. Petty Motor Co.*, 327 U. S. 372 (1946); *United States v. General Motors Corp.*, 323 U. S. 373 (1945).

There is no merit in appellants' contention that their compensation should be measured solely by the supposed excess of the value of the property over the option price. Cf. *Brooks-Scanlon Corp. v. United States*, 265 U. S. 106, 123-124 (1924). Their own witnesses testified that that was but one element to consider in fixing market value (R. 817, 833, 870, 919, 922). Market value is ordinarily the proper measure of compensation for property taken in eminent domain. *United States v. General Motors Corp.*, 323 U. S. 373 (1945); *United States v. Miller*, 317 U. S. 369 (1943).<sup>8</sup> There is nothing in the circumstance that appellants' lease could not be assigned without the consent of the lessor that requires the adoption of any different measure. Just as the determination of market value assumes a willing buyer

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<sup>8</sup> This does not mean, as appellants seem to assume (Br. 29-31), that market value is the standard for determining compensation only when there is an established market price for the property taken. As the Supreme Court pointed out in *Olson v. United States*, 292 U. S. 246, 257 (1934,) when property (in that case, flowage easements) is not currently bought and sold, the market value must be estimated, but the measure of compensation is that estimated market value. Cf. *Brooks-Scanlon Corp. v. United States*, 265 U. S. 106, 123-124 (1924).



and a willing seller, so it would in this case assume an acquiescent lessor. That was in effect done by all the witnesses both of appellants and of the United States, whose testimony was based on an assumption, for the purpose of fixing market value, that appellants' interest in the property could be sold (R. 774, 816, 836, 869-870, 907, 1095, 1200). Market value was in fact the principal measure of compensation advanced by appellants and to which their evidence was directed (R. 748, 750-751, 801-802, 830-831, 869, 880-881); it is not now open to them to assert that a different measure should have been used. However, it may be observed that the measure they now suggest, the supposed excess of the option price over the value of the property (Br. 44), was considered by all of the valuation witnesses both for appellants (R. 747, 817, 833, 870, 919) and for the United States, the Government's evidence being that the option price greatly exceeded the value of the property (R. 1111-1113, 1202).

### III.

#### **The Trial Court Did Not Err in Allowing the United States to Impeach Appellants' Evidence by Showing an Admission Contained in Their Offer of Compromise.**

For the purpose of showing the value of the consideration given by them, appellants introduced testimony by Mr. Tavares that a fair fee for appellants' supervisory services in constructing the shipyard would have been 10 per cent of the actual construction costs, because "That is a minimum fee that a contractor is entitled to when he builds anything for a guaranteed cost" (R. 741). On cross-examination the United States introduced, as an admission going to impeach that testimony (R. 788), a letter from Concrete Ship Constructors offering to compromise their claim for this taking and containing the unqualified statement that a minimum construction fee was three per cent, amounting in this case to \$80,000 (R. 769-771). Appellants objected to that evidence on the ground that it was part of an unaccepted offer of compromise (R. 769). They now assign its admission as error (Br. 48-51).

Appellants are of course correct in their statement that an offer to compromise, as such, is not admissible in evi-



dence.<sup>9</sup> However, it is equally well settled that if a clear admission of a distinct fact is made in such an offer, that may be received in evidence as an admission against the party making it, despite the fact that it is contained in an offer of compromise. *Montana Tonopah Mining Co. v. Dunlap*, 196 Fed. 612, 617 (C. C. A. 9, 1912); *Cooper v. Brown*, 126 F. 2d 874, 878 (C. C. A. 3, 1942). That rule is in fact stated in the District Court of Appeal's opinion in *Citti v. Bava*, 254 Pac. 299 (1927),<sup>10</sup> quoted by appellants (Br. 51). The letter here complained of contained a distinct admission, made by way of explanation and not at all as a part of the offer, that a minimum fee would have been three per cent of construction costs (R. 770-771). The letter was offered solely for the purpose of showing that admission (R. 788). Its admissibility for that purpose, to impeach Mr. Tavares' testimony that a minimum fee would have been 10 per cent, cannot be doubted.

#### IV.

#### **There Was No Prejudicial Error in the Government's Argument to the Jury.**

In his argument to the jury, counsel for the United States made some references to appellants' past profits from operation of the property condemned (R. 1255, 1267, 1268, 1275, 1277), and appellants now contend that those references require reversal of the judgment (Br. 52-55).

In the trial court, appellants did not move for mistrial, object to the statements by government counsel, or even request an admonition to the jury. A party "cannot as a rule remain silent, interpose no objections, and after a verdict has been returned seize for the first time on the point that the comments to the jury were improper and

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<sup>9</sup> It may be noted, however, that their reliance on California Code of Civil Procedure, sec. 997, to support that position is not justified. The letter here involved was not an offer to submit to judgment, which is all that is dealt with in that section. See Appellants' Brief, p. 50.

<sup>10</sup> That opinion was superseded by the decision of the California Supreme Court, 204 Cal. 136, 266 Pac. 954 (1928), which does not discuss the question of admissions of fact contained in offers of compromise.

prejudicial.” *United States v. Socony-Vacuum Oil Co.*, 310 U. S 150, 239 (1940). The present case is not such as to justify departure from the general rule.

As appears from the record references given, the statements quoted by appellants in their brief (pp. 52-53) occurred at rather widely separated points in the Government’s argument. Taken thus from their several contexts and set out together, they do appear to advance the contention that appellants should receive nothing in the present condemnation because they had already profited largely from their dealings with the United States relating to this property. However, when the argument is read as a whole, it appears that the several statements were made as valid parts of legitimate arguments, addressed to the issues as developed in appellants’ own theories and evidence. Thus, the reference (R. 1267) to appellants’ admission in their letter of November 24, 1944 (R. 770-771), that a minimum fee for their services would have been \$80,000, was a perfectly justified commentary on their contention that their compensation should be measured by the value of those services (R. 698-699) for which their evidence was that a minimum fee would have been more than three times that amount (R. 741). So also the reference to appellants’ use of the facilities for private repairs (R. 1268-1269) was made not as a moral rebuke but as a step in developing the proposition that the principal use to be expected for the yard in the future was for private work which was not rent-free as work for the United States was (R. 1268-1272).

Appellants contend that the statement that they made profits is without support in the record (Br. 53). This overlooks the testimony of their own witness, Mr. Anewalt, that their profits had amounted to \$1,000,000 a year (R. 851). Appellants contend that reference to their profits was irrelevant and prejudicial (Br. 53-54). Its relevancy to the issues is shown by the fact that Mr. Anewalt gave it as justification for his valuation of the lease (R. 851).

## V.

**The Trial Court Did Not Err in Failing to Instruct the Jury  
As to the Legal Effect of Appellants' Lease Agreement.**

Appellants contend that the trial court erred in permitting testimony to be submitted to the jury as to the legal effect of appellants' lease agreement, rather than instructing the jury thereon (Br. 55-61). There are several answers to that contention.

Appellants were the first to introduce testimony as to the legal effect of their lease (R. 749, 798-801, 832-835, 870, 884-889). Having themselves put the subject before the jury, they cannot now be heard to object that the jury was allowed to consider it. Also, appellants made no request for an instruction on the subject. In the absence of a request, failure to give an instruction cannot be attacked on appeal. *Puget Sound Power & L. Co. v. Public Utility Dist. No. 1*, 123 F. 2d 286, 291 (C. C. A. 9, 1941). Even under the liberal California statute, it is only the refusal, and not the mere failure, to give an instruction that is deemed excepted to. California Code of Civil Procedure, sec. 647.

The testimony was in every instance given by the witnesses for the purpose of showing the assumptions on which their valuations were based (R. 749, 797-801, 831-835, 869-870, 881-889, 1096-1104, 1168-1171). Obviously that information was necessary to enable the jury to weigh the opinions of the witnesses.<sup>11</sup> The agreement itself was put in evidence by consent (R. 696-697) and the jury could compare its terms with the construction put on it by the various witnesses or appellants could develop its meaning in their argument to the jury, or request the court to instruct the jury with regard thereto.

Finally, it may be suggested that the true legal construction of appellants' lease was not in issue in the case. The issue was the market value of their rights under it, which would depend on how that lease appealed to prospective

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<sup>11</sup> Among other things, appellants challenge the correctness of a statement by the Government's witness Shattuck that the provision for use of the yard free of rent applied only to use for government work (Br. 55-56). The fact is, however, that appellants conceded at the trial that that was true (R. 724) and the testimony of their witnesses was to the same effect (R. 749, 793, 824, 851).

buyers, rather than on how it should be construed by a court (cf. R. 1142, 1160, 1200). In that aspect, testimony by real estate appraisers was more appropriate than an instruction from the court would have been. Be that as it may, appellants are precluded here by their failure to raise the point at the trial.

## VI.

### **The Verdict and Judgment Are Supported by Substantial Evidence.**

Appellants contend that the award of nothing for their interest must be reversed as unsupported by evidence (Br. 61-63). Two witnesses for the United States testified that appellants' interest had no value (R. 1116, 1175); but appellants would disregard that testimony because they believe that it was based on erroneous premises (Br. 61). That amounts to no more than an attempt to have this Court reweigh the evidence. The opinions of the Government's witnesses were in evidence; the grounds on which they were based were fully brought out by direct and cross-examination (R. 1096-1117, 1125-1160, 1168-1175, 1178-1206) and appellants made no motion to strike their testimony. The jury was entitled to consider the testimony and to give it such weight as it appeared to deserve. Both witnesses considered the relationship between the option price and the value of the property, which appellants now urge should be the sole measure of their compensation (Br. 44), and both concluded that the value of the property was substantially below the option price (R. 1112-1113, 1202). Under appellants' own view that alone fully justified the opinion that their interest was worthless. In addition, the witnesses considered the value of the lease contract, including the right of free use for government work, and concluded that the uncertainties to which it was subject and doubt as to future need for such facilities would make it unattractive to purchasers (R. 1113-1117, 1132, 1151-1153, 1160, 1174, 1199-1200). Certainly those are valid grounds for the opinions of qualified experts; it cannot be said that the jury erred as a matter of law in giving credence to them.



## VII.

### **The Verdict and Judgment Are Not Contrary to Law.**

Appellants argue that the verdict and judgment awarding them nothing, are contrary to law (Br. 64-65). The court instructed the jury to give appellants only a nominal award if they could have sold their rights only for a nominal sum (R. 1293), and to award them nothing if they could not have sold their rights at all (R. 1295-1296). As we have shown under Point II, *supra*, the latter instruction referred to an inability to sell due to lack of attraction for buyers. By awarding appellants nothing under the above instructions, the jury expressed its belief that no buyer would have paid even a nominal sum to acquire such rights as appellants had. Appellants contend that this violates the Fifth Amendment, which they construe as guaranteeing them some award in any case. It is true that nominal compensation is commonly given when valueless properties are condemned; but the constitutional requirement of "just compensation" is one of substance rather than form, and an award of nothing for a valueless property is quite as just as an award of one dollar. "Nothing was recoverable as just compensation, because nothing of value was taken from the company; \* \* \*." *Marion & Ry. v. United States*, 270 U. S. 280, 282 (1926). Certainly it does not appear how the error, if it were such, in failing to award a nominal sum could be prejudicial.

## VIII.

### **The Trial Court Erred in Ordering the Judgment Modified to Exclude Appellants' Purchase Option.**

Appellants filed their notice of appeal on August 26, 1947 (R. 367). Thereafter, on November 18, 1947, they filed their notice of motion to correct and modify the judgment (R. 381-382). On December 2, 1947, the Court entered its order thereon, directing that the judgment be modified to omit appellants' purchase option from the description of their rights condemned and compensated for in this proceeding (R. 389, 1418-1448, 1459). The United States appeals from that order (R. 1460-1461).

When the proposed judgment was presented to the court, the court asked whether appellants had any objections to

its form, to which their counsel replied that their only objections were the same as were set forth in their motion for new trial (R. 1334). One of the objections made with that motion was that the court had improperly instructed the jury as to the measure of compensation for the option (R. 332-342). Thus it was clearly brought to the court's attention that appellants, like the United States, considered that the issue of compensation for the option had been tried, and that it was likewise included in the judgment. Appellants' subsequent motion to modify the judgment on the ground that the option had not been included in the issues tried was thus diametrically opposed to the position taken by them when the judgment was entered.

The court's order modifying the judgment was made on the ground that the word "option" had been included in the judgment by inadvertence (R. 1437), and that by striking that word from the judgment the judgment would be made to conform to what the court had expressed its intention to be throughout the proceedings (R. 1439). As has been shown under Point I, *supra*, the court had, on the contrary, ruled at pre-trial and consistently taken the view thereafter that the option was included in the taking and was compensable in this proceeding. On that ground it had overruled the Government's objection to appellants' evidence as to the value of the option (R. 745-747, 781, 802, 830-831, 869, 881). On that premise it had twice instructed the jury that in fixing appellants' award, if any, "you are also instructed to take into consideration the option rights" (R. 1294, 1302), and that in valuing appellants' interest, which arose out of a "lease coupled with an option," "You will consider the entire instrument, not just parts of it" (R. 1295, 1303). The court plainly erred in ruling that the issue of compensation for the option was not tried and submitted to the jury.

In ordering the judgment modified to exclude the option, the court was not making it conform to the issues as tried, as it purported to be doing. It was, on the contrary, creating a disparity between the issues tried and the judgment. The change was erroneous on the record and, being more than a mere clerical correction, was beyond the jurisdiction of the court to make after an appeal had been taken.

*Bankers Indemnity Ins. Co. v. Pinkerton*, 89 F. 2d 194, 199-200 (C. C. A. 9, 1937), certiorari denied 302 U. S. 704. Such an order is final and appealable. *Massachusetts Fire & Marine Ins. Co. v. Schmick*, 58 F. 2d 130 (C. C. A. 8, 1932).

### CONCLUSION.

For the foregoing reasons, the order of December 2, 1947, modifying the judgment, should be reversed and the judgment as entered June 6, 1947, should be affirmed.

Respectfully,

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June 1948.

No. 11820.

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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TAVARES CONSTRUCTION COMPANY, INC., a corporation,  
CONCRETE SHIP CONSTRUCTORS, a joint venture,  
STROUD-SEABROOK, a copartnership, LLOYD S. STROUD,  
R. S. SEABROOK, C. M. ELLIOTT, CARLOS TAVARES,  
HENRY M. PAGE and DON F. GATES,

*Appellants and Cross-Appellees,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee and Cross-Appellant.*

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REPLY BRIEF OF APPELLANTS.

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**FILED**

JUL 17 1948

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No. 11820.

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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TAVARES CONSTRUCTION COMPANY, INC., a corporation,  
CONCRETE SHIP CONSTRUCTORS, a joint venture,  
STROUD-SEABROOK, a copartnership, LLOYD S. STROUD,  
R. S. SEABROOK, C. M. ELLIOTT, CARLOS TAVARES,  
HENRY M. PAGE and DON F. GATES,

*Appellants and Cross-Appellees,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee and Cross-Appellant.*

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## REPLY BRIEF OF APPELLANTS.

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### Exceptions to Appellee's Statement.

Appellants, Tavares Construction Company, Inc., *et al.*, point out the following errors in Appellee's Statement:

1. Appellee states (Br. 4) that the lease provided that either party could terminate the lease by giving notice that Tavares no longer needed substantial use of the yard for construction of boats for the United States. This statement is not quite correct and is misleading. The lease provided that at any time when substantial use by lessee of the yard was no longer required to construct boats for the Government, then either party could terminate the lease on ten days' notice [R. 55, 56]. Upon



such termination lessee had 90 days to exercise an option to purchase [R. 58], and upon the expiration of the option period lessee was to surrender possession [R. 61]. Thus Appellants had the right of possession for 100 days after service of a notice of termination.

2. Appellee states (Br. 4) that Tavares could not sublease or assign its rights without permission. This statement leaves out the important part thereof which was that Tavares could not sell its rights without prior consent of Defense Corporation and approval of Maritime Commission [R. 64]. The word "sell" used in the lease was of great significance to the jury when considered in the light of Government counsel's argument to the jury and the Court's instructions.

3. Appellee states (Br. 5) that there were three ship contracts. There were five ship contracts [R. 717], a Master Ship Repair Contract with the Army, and a Master Ship Repair Contract with the Navy [R. 848].

4. Appellee states (Br. 7): "The Court stated that Appellants would not be allowed to show what they could have recovered in a suit for breach in the Court of Claims, but that the case would be submitted to the jury on the theory that the jury should fix just compensation." The latter part of this statement omits the qualifying language of the Court that "in so far as it can," the Court would permit the jury to find just compensation [R. 701].

5. Appellee states (Br. 7): "In connection with offers in evidence of portions of the pre-trial stipulation and agreed statement of facts, the Court stated that, in valuing the option, occurrences and agreements between the parties subsequent to December 23, 1944, should be

excluded from consideration as irrelevant. So far as they might afford basis for recovery for breach or frustration, the Court indicated that they could only be litigated in the Court of Claims.” This statement is incorrect. A correct statement would be:

In connection with the position taken by the Government in determining the value of the leasehold, that it was entitled to show what it would have cost lessee for insurance, taxes, etc., after December 23, 1944, if the lease had not been condemned, the Court stated that the law of the case had been established as to the right to compensation for the leasehold, that the option was the only complex situation, that when it comes to the question of value of the option the case can be simplified by the optionee preserving in the Court of Claims anything subsequent to the date of termination, that anything that comes within the period up to December 23, 1944, is relevant, that anything that occurred subsequent to December 23, 1944, is not relevant, and indicated that any claim for frustration, breaches, and so forth could only be litigated in the Court of Claims [R. 724-725].

Since the option could not be exercised until the expiration of the lease or the termination thereof, and there had been no termination, this deadline was adopted by the Court to exclude the option from this case and preserve it for suit in the Court of Claims as the Court considered the taking on December 23, 1944, to have frustrated Appellants' right to have the option come into being.

6. Appellee states (Br. 8): “Mr. Mueller testified that the option was worth \$500,000 and the lease itself was worthless [R. 881, 901.]” This is incorrect. Mr.

Mueller testified that the lease was worth \$500,000 [R. 881]. He did not testify as to any added value for the option [R. 907-922]. On cross-examination he said the land had increased in value \$387,899 between the date of taking from the owners and the date of taking from Appellants [R. 922]. He did not say the lease was worthless. He said he did not include in his valuation of \$500,000 for the lease, any bonus for the National City lease to Tavares on the 18 acres [Exhibit 5] which Tavares had assigned to Defense Corporation [R. 900 to 907]. Thus the witness was talking about a different lease than the one to which Appellee ascribes the statement.

7. Appellee states (Br. 7): "Each of the witnesses stated that he included the option in valuing Appellants' contract rights." This statement is misleading. Appellants' appraisers expressed only their opinions as to the value of the leasehold estate. While each stated he had taken into consideration the option provision as well as all other provisions of the lease in arriving at his opinion, none of them added anything to their valuation of the leasehold for the option, although their testimony shows that the option had an added value [R. 810-827, 832-865, 869-879, 881-922]. The option, besides having a value as such, was also a protective provision for the leasehold estate, in that it would either prevent the Government from terminating or give the lessee the right to purchase in the event of termination and thereby preserve the leasehold benefits. This is the consideration that Appellants' appraisers gave to the option. This does not mean that they included the value of the option as such in valuing the leasehold. Actually the option had a value in itself in excess of the leasehold. The facilities and machinery

alone were worth \$500,000 more than the option price [R. 747]. The land was worth \$387,899 more than the option price [R. 922]. Thus we have a value of \$887,899 for the option alone.

Actually the option prevented the Government from terminating, otherwise it would have done so instead of condemning. The Government knew that Appellants considered the option valuable [R. 770].

Pursuant to the Court's rulings, Appellants were confined to market value of the leasehold and were not permitted to prove the amount of damages that they had suffered by reason of the condemnation having frustrated their option rights [R. 701, 725, 1432, 1438, 1442].

8. Appellee states (Br. 8): "Mr. Anewalt justified his appraisal by stating that Appellants' profits had amounted to \$1,000,000 a year [R. 851]." This is incorrect. The \$1,000,000 a year referred to was the rent that Appellants had paid Defense Corporation under the lease [R. 842, 851]. The witness was asked whether Appellants could pay a rent of 10 cents per man hour on 7,000,000 man hours per year or \$700,000, and the witness said they could because they had paid \$1,000,000 a year under the lease when they were building boats [R. 851]. Actually the figure of \$1,000,000 per year profits is substantially in error, but there is nothing in the record as to what appellants' profits were.

9. Appellee states (Br. 8) that its objection that a purchase option was not such an interest in the property as to be compensable in eminent domain was consistently overruled on the ground that the Court would not deviate from the pre-trial ruling that the option was taken and compensable in this proceeding. This is incorrect. The



objection was overruled because it was not pertinent to the questions to which it was directed. Mr. Tavares and Mr. Seabrook were each asked as to the value of the facilities and machinery [R. 746, 780]. The four appraisers for Appellants were each asked as to the value of the leasehold estate [R. 802, 831, 869, 880]. The pre-trial order does not state that the option was compensable in this proceeding. It states that Appellants have a compensable interest in the property [R. 310]. They had this by reason of the leasehold estate, regardless of the option. The trial court interpreted the pre-trial ruling as holding that only the leasehold estate was compensable in this proceeding [R. 724-725, 1432, 1437, 1438, 1440, 1442].

10. Appellee states (Br. 8) that Appellants initiated the practice of having the witnesses as to values explain what they understood the rights under the lease to be. This practice was initiated by Appellee in its cross-examination of Mr. Tavares [R. 751, 757, 761-765, 771-774].

11. Appellee states (Br. 11) that at the hearing on motion for new trial the Court pointed out that "the Court had felt bound to follow and had followed Judge Yankwich's pre-trial ruling that the option was compensable, but that did not mean that it was to be compensated for if the jury found that it had no value [R. 1395-1398]." This is incorrect. The Court pointed out that while Judge Yankwich's ruling said that Tavares had a compensable interest, that that did not mean that the Court had to tell the jury that they must find that there is some compensation due the Tavares interests [R. 1395-1398].

### Summary of Argument.

The Court ruled on pre-trial that the lease and option had been taken and that Appellants had a compensable interest in the property. The trial court did not interpret this to mean that the option was compensable in this proceeding, ruled that the question as to the value of the option could only be determined in the Court of Claims, and limited the proof to the market value of the leasehold estate. Pursuant to this ruling, Appellants limited their proof to market value of the leasehold estate. The jury were instructed that their award to Appellants, if any, was to be the market value of the leasehold estate. The option was considered only to the extent it provided protection against termination of the leasehold estate. The value of the option has neither been tried nor determined in this proceeding.

The State Rules of Procedure apply and not the Federal Rules, and the case was tried on that theory. The Appellate Court has the privilege and duty to notice error, even in the absence of objection or exception, to prevent an injustice.

Appellee contended during the trial and in its argument that the lease could not be sold because of the provision against alienation and that consent to sell had not and could not be obtained, and the Court instructed the jury to determine this question.

The offer of compromise was not used for impeachment purposes but as an admission as to the value of the leasehold estate and to infer that Appellants had already been compensated.

The Appellee's argument to the jury was so prejudicial that it is the power and duty of this Appellate Court to correct the error.

Both the Appellee and the Court told the jury that they were to determine the interest of Appellants under the lease instead of telling them what that interest was and leaving to the jury only the determination of the value of that interest.

An opinion as to value, based upon an erroneous premise, is not evidence. To hold that it is evidence would involve the assumption that the opinion would be the same if based upon a correct premise. Appellee's contention that the verdict is supported by the evidence is based upon assumed evidence and not upon evidence.

Appellants had a minimum of 100 days' right of possession even if the lease were terminated. No one can deny that 100 days' possession of a \$3,000,000 complete shipyard is of substantial value.

The award is so grossly inadequate as to shock the conscience of this Court. The trial has resulted in a miscarriage of justice. Actually the jury did not determine the amount of just compensation but only determined that prior consent had not been obtained to make a sale of the lease and that therefore no sale could be made under the terms of the lease.

The trial court corrected the judgment to eliminate the disparity between the issues tried and the judgment. The Court did not change its mind. The best evidence of what was in the Court's mind during the trial is the Court's own statement with reference thereto made at the time the judgment was corrected.

## ARGUMENT.

All of the points argued by Appellants have been preserved for review by this Court, as will be more fully pointed out under each point. In addition it was stipulated that all adverse rulings should be deemed excepted to [R. 462-463].

### I.

#### **The Issue of Just Compensation for Appellants' Purchase Option Has Not Been Tried and Determined in This Proceeding.**

Appellee says that the case was tried on the theory that the option rights were taken and compensable in this action, that the witnesses testified as to the value of the option over Appellee's objection that they were not compensable in this action, that the jury was instructed to include in their verdict compensation for the option and that such compensation was included (Br. 14-17).

In support of this contention, Appellee misstates the evidence, picks out isolated statements from the record and attributes to them meanings wholly contrary to the true meaning thereof when read in the light of the entire record, and misconstrues the rulings and instructions of the Court.

This was a complex case, involving questions of law as to which there is no precedent. This action was instituted to acquire land for the use of Appellants [R. 20]. Over two years later the Supplemental Complaint was filed [R. 249], which was indefinite as to just what was intended thereby. Appellants filed a motion for a more definite statement [R. 259]. Appellee filed a Bill of Particulars [R. 266] which still left it uncertain as to the extent of the taking. Appellants answered alleging



their interpretation that their rights had not been taken [R. 272]. Appellee was likewise in doubt as to the extent of the taking, as on September 3, 1946, or 20 months later, it served on Appellants a notice terminating the lease [R. 293], in response to which Appellants demanded information as to the amount of the option price [R. 296-298]. No reply was received, but in the meantime the parties jointly submitted the matter to the Court on pre-trial [R. 277-306] to determine. The Court on pre-trial ruled that Appellants' lease and option rights had been condemned and that Appellants had a compensable interest in the property taken [R. 310].

Appellants understood this ruling to mean that their option rights were compensable in this action and so contended at the trial [R. 698-700]. Appellee contended otherwise [R. 745]. The Court interpreted the ruling to mean that compensation for the leasehold only could be awarded in this action and that the matter of the option would have to be preserved for determination in the Court of Claims as the District Court was not the proper forum therefor [R. 724-727, 1432, 1437, 1438, 1442].

Appellants' theory is stated in the record at pages 698 to 700. Appellee's reference to Appellants' statement as to their theory [Br. 16, R. 725] to the effect that December 23, 1944, was a deadline and that they were limited to the market value of the leasehold estate was merely Appellants' statement of their understanding of the Court's prior ruling [R. 700-701].

Appellants have consistently maintained that since this was a condemnation by the Government of its own obligation, and the District Court having acquired jurisdiction, that the matter of compensation could not be tried piecemeal, that the entire matter should have been determined

in this proceeding, and that it was error for the Court to segregate the issues, try only the matter of compensation for the leasehold estate in this proceeding and attempt to preserve the matter of compensation for the option for determination by the Court of Claims.

Appellee has consistently contended until now, that Appellants' remedy was in the Court of Claims. Now after getting Appellants' evidence as to the compensation for the option excluded, and then after the Court had inadvertently signed a judgment (which Appellee prepared) which, by including the word "option" therein, would have deprived Appellants of their right to maintain an action therefor in the Court of Claims (but which judgment the Court corrected), Appellee now by misstating and twisting the facts, contends that the matter of compensation for the option was determined in this proceeding.

On page 15 of Appellee's Brief, the facts are again misstated. Appellants have pointed out these errors in paragraphs 6, 7 and 9 of their Exceptions to Appellee's Statement. These misstatements are used by Appellee as the basis for its argument that the compensation for the option was tried and determined in this case. We again point out that the only evidence that Appellants were permitted to introduce under the Court's ruling, and did introduce, was as to the market value of the leasehold estate [R. 802, 831, 869, 880]. The evidence as to the cost of the facilities and machinery [R. 692], the rental paid under the lease [R. 693], the value of a fee for the construction thereof [R. 741], the value of the facilities and machinery [R. 747, 781, 791], and the value of the land [R. 922] were all matters pertinent to the valuation of the leasehold

thereon and supporting the opinions of the witness as to the market value of the leasehold estate.

Not one of Appellants' witnesses was asked for his opinion as to the value of the option. True, each witness testified he took into consideration the option provision along with all of the other provisions of the lease in arriving at his opinion, but none of them added anything to their valuations of the leasehold estate or included anything therein because of the option as such. It is evident, however, that each of Appellants' witnesses considered the option to be worth more than the full unexpired term of the leasehold estate. There was much discussion with Appellants' witnesses on cross-examination with reference to the termination and priority provisions. It is clear that the consideration given by Appellants' witnesses to the option provision was limited to the protection given to the lessee thereby against a possible early termination of the leasehold estate.

In other words the option would act as a deterring factor against termination by the Government, but in the event of termination, the lessee could protect his rights through the exercise of the option. That the option had this effect is demonstrated by the very fact that the Government brought this condemnation action instead of merely serving a notice of termination or requesting priority. The Government knew that Appellants considered the option to be very valuable [R. 770, 784].

The Court in instructing the jury to take into consideration the option rights, meant no more than to consider

them to the extent that the witnesses had considered them, to wit: as a protection against termination of the leasehold estate. Certainly the jury could not, and did not, include a value for the option rights in the absence of any evidence upon which to base a value therefor. The Court did not instruct the jury to "include the value of the option in their award" as stated by Appellee (Br. 17). The Court instructed the jury to make their award the market value of the leasehold estate, that in arriving at such award they were to take into consideration the possessory rights, the right of the Government to prior use, the right to terminate and the option rights [R. 1294]. Thus the consideration which the jury was to give to the option rights was only in connection with the leasehold estate, *viz.*: the protection it gave against the priority and termination provisions. If priority were requested, Appellants would then no longer require the use of the facilities for constructing boats for the Government, and Appellants could elect to terminate and thereby bring the option provisions into operation.

As to Appellee's statement (Br. 16) that the ruling of the Court that Appellants would not be entitled to show what their recovery might have been in a Court of Claims suit, was correct, we wish to point out that the authorities cited by Appellee in support thereof in footnote 6 were not cases where the Government was condemning its own obligation. We submit a different rule should apply, and that the Government can not escape its contract obligations under the guise of condemnation. The Supreme Court has recognized that exceptions must be made to the ordi-



nary measure of compensation when the facts justify it. In the case of *United States v. General Motors*, 323 U. S. 373, where a temporary lease was condemned out of a long term lease, and the expense of the lessee moving out was more than the award for the temporary term taken, the Court in holding that evidence as to this expense should not have been excluded, said:

“If such a result be sustained, we can see no limit to the utilization of such a device; and, if there is none, the Amendment’s guaranty becomes, not one of just compensation for what is taken, but an instrument of confiscation fictionalizing just compensation in some such concept as the common law idea of a peppercorn in the law of seizin or the later of ‘value received’ in that of contractual consideration.”

It was therefore error for the Court to exclude evidence as to any of the losses or damages which Appellants sustained which Appellants would have been entitled to prove in the Court of Claims had Appellee merely taken possession and refused to perform its obligations under the lease instead of accomplishing the same result by instituting this proceeding. The Government has the right to arbitrarily take private property, but it must pay just compensation. It likewise has the right to arbitrarily breach a contract, and specific performance can not be compelled, but it must pay just compensation. The measure should be the same in either case, otherwise the Government could escape its just obligations through the device of condemnation.

II.

**The Trial Court Erred in Instructing the Jury.**

Appellee contends (Br. 18) that Section 647 of the California Code of Civil Procedure which provides that giving an instruction, although no objection was made is deemed excepted to, is not applicable and cites as authority therefor decisions dealing with the General Conformity Act, 28 U. S. C. Sec. 724. The General Conformity Act was repealed by the Federal Rules of Civil Procedure. (*DeRosmo v. Feeney* (D. C. N. Y. 1941), 38 F. Supp. 834.) Rule 51 of the Federal Rules requires the Court to inform counsel as to the instructions before giving them and requires counsel to state their objections. But Rule 81(7) provides that the rules (excepting those relating to Appellate procedure) do not apply to condemnation proceedings. The trial court held that the rules did not apply. The Court said:

“Before the argument, and although it is not required strictly, because this is not an action covered by the Rules of Civil Procedure, I propose to tell counsel exactly what the charge will be” [R. 1225].

Also see

*Eagle Lake Improvement Co. v. U. S.* (C. C. A. 5, 1944), 141 F. (2d) 562, 563.

The case was therefore tried upon the theory that the California procedure applied. However (apparently due to the shortness of time caused by the necessity of Government counsel leaving for another trial in the East), the Court did not tell counsel what the charge would be so as to give them an opportunity to study the instructions and intelligently make their objections as contemplated by Rule 51 [R. 1372]. If Appellee's contention is correct,

then it was error for the Court not to have informed counsel as to the instructions which the Court proposed to give to the jury.

The instructions were adverse to Appellants and were therefore deemed excepted to pursuant to the stipulation [R. 462-463].

In any event the instructions complained of were of such plain error that the Appellate Court is not only privileged, but is under a duty, to correct that error notwithstanding the fact that no specific exception was taken to those instructions below. The Appellate Court, as a Court of the United States should insure that the Appellants were not prejudiced by some plain error which redounded to the benefit of the United States and thereby thwart the mandate of the Constitutional Guaranty of the Fifth Amendment. That this Appellate Court has that privilege is shown by the following decisions:

In *United States of America v. Atkinson*, 297 U. S. 157, 160, 80 L. Ed. 555 (1936), the Court said:

“In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings.”

In *Ayers v. United States* (C. C. A. 8, 1932), 58 F. (2d) 607, 609, the Court said:

“Notwithstanding this rule (the rule that an error can be assigned upon appeal only if an exception was taken thereto in the trial court), this court, in order to prevent an injustice, may notice a plain error even in a civil case. *United States v. Tennessee & Coosa R. Co.*, 176 U. S. 242, 256, 20 S. Ct. 370, 44 L. Ed.

452; *Baltimore & O. R. Co. v. McCune* (C. C. A. 3), 174 F. 991, 992; *Ratetsky v. Gramm-Bernstein Motor Truck Co.* (C. C. A. 8), 4 F. 2d 965, 968; *New York Life Insurance Co. v. Rankin* (C. C. A. 8), 162 F. 103, 108.”

In *Helvering v. Rubinstein* (C. C. A. 8, 1942), 124 F. (2d) 969 at page 972, the Court said:

“To prevent a plain injustice, an appellate court may notice obvious errors in either criminal or civil cases, even though not properly called to the attention of the trial court or saved for review. *Ayers v. United States*, 8 Cir., 58 F. 2d 607, 609, and cases cited. But this right to disregard the rule that an appellate court will not ordinarily consider issues of law or fact not raised below, is a right to prevent a clear miscarriage of justice apparent from the record, and not a right to afford a defeated litigant another day in court because he thinks that if he were given the opportunity to try his case again upon a different theory he might prevail.”

In *Wiborg v. United States*, 163 U. S. 632, 658, 41 L. Ed. 289 (1896), the Court said:

“. . . although this question was not properly raised, yet if plain error was committed in a manner so absolutely vital to defendants, we feel ourselves at liberty to correct it.”

In *Clyatt v. United States*, 197 U. S. 207, 221, 49 L. Ed. 726 (1905), the Court said:

“While no motion or request was made that the jury be instructed to find for defendant, and although such a motion is the proper method of presenting the question whether there is evidence to sustain the verdict, yet *Wiborg v. United States*, 163 U. S. 632, 658,



justifies us in examining the question in case a plain error has been committed in a matter so vital to the defendant.”

That it is the duty of this Appellate Court to correct this error is found in the Constitutional Guaranty of the Fifth Amendment.

Appellee's interpretation (Br. 19-20) of the Court's instructions: “If you find it could not have been sold, then your verdict as to Tavares Construction Company, Inc., will be zero” [R. 1295-1296], is one which a so-called “Philadelphia Lawyer” might possibly be expected to ferret out after a lengthy study thereof and the application of legal implications. Certainly no layman juror could or would ever make such an interpretation. In any event, Appellee's interpretation is erroneous.

Appellee concedes in its brief (Br. 19) that it would have been error for the trial court to charge that if Appellants' interest in the property was not transferable then no compensation should be allowed for it. Appellee then argues, however, that the trial court made no such charge. Appellee contends that the charge “plainly deals only with the question of how much an assumed buyer would have paid” (Br. 20). In attempting to support this argument, Appellee points out that the Court instructed the jury to proceed in the same manner as they proceeded as to the market value of the land. Appellee then points out that the National City lands were inalienable, and goes back ten pages of printed record to find the instruction to disregard any agreements between the State and the City limiting the uses, and says this means alienation. We submit that an agreement “limiting the uses” does not prohibit “alienation.” There was a restriction upon the City's use as well as alienation [R. 1208-1211]. There was a re-

striction upon Appellants' use as well as alienation [R. 63]. We submit that a jury instruction is not designed to be a mental exercise nor a problem in logic, but is meant to point out to the jurors the exact manner in which they are to proceed in arriving at a verdict, and, if it fails to do so, it must fall.

However, assuming that the jurors were supposed to go through this mental process, and that it was humanly possible for them to have done so, we submit that the reference was to the limitation on the uses and had nothing to do with alienation. A limitation of the use of property is quite a different matter than a prohibition against alienation.

Furthermore, when the jury came back and asked to have the Tavares instructions read again, the Court did not go back and read this portion of the instructions as to the land [R. 1300-1303].

After instructing the jury to proceed in the same manner as they proceeded as to the market value of the land, the Court explained what it meant thereby, to wit: "the question being, what could it have been sold for on the open market for cash on December 23, 1944, the date it was taken or cancelled by this proceeding, or shortly thereafter above what Tavares Construction Company, Inc., would have to have paid under all its terms and conditions" [R. 1295]. This is merely the ordinary rule for determining the bonus value of a leasehold estate. It means the difference between the value of the use and the rent that must be paid for the use. However, the use of the word "canceled" was erroneous and misleading to the jury. Appellee's witness Mr. Mason had given as one of his reasons for his valuation of nothing, that the lease had been canceled by this condemnation action [R. 1180,

1200-1201]. The lease was not canceled, it was acquired. Had it been canceled, it would then of course have had no value.

Following this, the Court instructed the jury to determine a question of law, *viz.*: whether or not Appellants could sell [R. 1295]. Such instruction was wholly unnecessary if all the Court was doing was telling the jury how to arrive at the amount an assumed buyer would have paid as Appellee contends (Br. 20). The Court told the jury if they found that it could have been sold, then they should determine the amount, but if they found it could not have been sold, then their verdict should be zero [R. 1295-1296].

Appellee states that the lease “provided that it could not be transferred without the consent of Defense Plant Corporation and the Maritime Commission” (Br. 19). Appellee carefully omits the important word “sell” contained in the lease provision [R. 64]. Appellee likewise overlooks the position its counsel took during the trial [R. 774] and in his argument to the jury [R. 1262] that this provision prohibited a sale. In his argument he read this provision to the jury and told them that Tavares would not get five cents for the lease without this consent to a sale [R. 1262]. Furthermore the lease says “prior” consent and there was no evidence that such consent had been given.

The instructions should be interpreted in the light of the facts and circumstances of what occurred at the trial and in the manner in which it is evident the jury must have understood them. Certainly the purpose of instructions is to give the law to the jury in plain simple language so that it will understand it, and the important thing is how a jury understands an instruction and not how a lawyer may be able to interpret it.

Appellee denies (Br. 21) that it sought to prove that Appellants' rights were inalienable. It certainly attempted to (and we sincerely believe did) convince the jury of that fact. Appellee's counsel made the following statement in his cross-examination of Mr. Tavares:

"Q. How could it be sold? How could you sell it to a willing buyer with a clause in there providing that you couldn't unless you got the consent of the Defense Corporation and the Maritime Commission?" [R. 774.]

Appellee's counsel made the following statement in his argument to the jury:

"Here is the thing that Mr. Hindes said was such that he never would even signed this lease in the first place."

\* \* \* \* \*

"Twenty-four: Lessee will not without prior written consent of Defense Corporation and the approval of the Maritime Commission sell, assign, or pledge this lease or any of its rights or obligations hereunder, or sublease or permit the use by others of any of the property covered by this lease.

Mr. Willing Buyer, I want to sell you this lease, I want to assign it. I want to sublet a part of it to you. What will you give me?

'Why, Mr. Tavares, you can't do that without you get the consent of the Defense Plant Corporation and the Maritime Commission. I wouldn't give you five cents for it. How do you know, that they are going to let you make a profit on this paper? Is it reasonable to suppose after they put up for you \$2,700,000 and build you a shipyard, that they will permit you to



go ahead and sell this paper? Do you not know that on the date of this lease it is indicated that the Navy of the United States proposes to take over those utilities?’

Mr. Tavares told me that he thought that he could get the consent of the Defense Plant Corporation and the Maritime Commission for him to make another half million dollars” [R. 1262].

Thus Appellee told the jury that the lease could not be sold because the consent could not be obtained for Appellants to make a profit on the lease, instead of telling the jury that they should assume that the consent had been given.

Lastly, the Court instructed the jury that if they found it could not have been sold, then their verdict will be zero [R. 1295-1296]. This clearly meant to the jury that if they found that the lease could not have been sold, that then they did not need to determine the value thereof, but should indicate such finding by rendering a verdict of zero. That this was the clear implication of the instruction is supported by the prior instruction to the effect that if they found that no purchaser would have purchased except for a nominal consideration, then their verdict must be in a nominal figure only [R. 1293].

In other words the instructions conveyed to the jury that they were to determine two questions as to Appellants: First, whether or not the lease could be sold under its terms. If it could not, their verdict was to be zero. If it could, then they were to determine the second ques-

tion of how much. This was to be the market value of the leasehold estate. If they found that the interest of Appellants under the lease was so speculative and conjectural that no purchaser in the open market would have purchased the same except for a nominal consideration, then their verdict was to be in a nominal figure only [R. 1293]. Even this instruction was erroneous in that it required the jury to determine a question of law, to wit, whether the "interest" of Appellants was speculative or conjectural, instead of whether the "value" of Appellants' interest was speculative or conjectural. There was no speculation or conjecture as to whether Appellants had an interest.

The jury, after deliberating for some time, requested the Court to read the instructions as to Appellants to them again. Evidently the jury was not having difficulty on the question of values, else they would have also requested the instructions as to the land owners read to them again. Evidently the thing that was bothering them was this other question which the Court had asked them to determine as to Appellants (whether or not a sale could be made) that they wanted to be sure about. The instructions as to Appellants were read again [R. 1300-1303]. The last one, to wit, "If you find it could not have been sold, then your verdict \* \* \* will be zero" [R. 1303], is plain and simple and the one which must have remained foremost in their minds when they again retired to the jury room at 6:20 o'clock P. M. [R. 1303]. They returned with their verdict at 6:40 o'clock P. M. [R. 1304]. The Court had made it simple for them and it didn't take

them long. They evidently looked through the lease, read the provision that prohibited a sale without prior consent, found that there was no evidence that such consent had been given, concluded therefore that the lease could not be sold, and obeyed what they understood the Court had instructed them to do in such event, by rendering a verdict of zero.

This conclusion is further supported by the fact that the jury believed the National City appraisers 100 per cent in its award to National City. The same appraisers testified for Appellants. It is unbelievable that the jury gave such full faith and credit to the testimony of these witnesses as to National City, but so fully discredited their testimony as to Appellants. Something else happened, or they would have brought in a verdict for something for Appellants. They rendered their verdict of zero, not as to value, but because they believed they had to under the Court's instructions and the prohibition in the lease against selling without prior consent, which Appellants had failed to prove they had obtained.

With reference to Appellants' point made in their Opening Brief, pages 29 to 36, that market value was not the proper measure of compensation when there was no market, we call the Court's attention to *United States v. Savannah Shipyards* (C. C. A. 5, 1944), 139 F. (2d) 953, 140 F. (2d) 863, involving the condemnation of a shipyard then in the process of being constructed, where there had been no sales of such and evidence as to the costs of construction was held proper.

III.

**The Offer of Compromise Was Not Used for Impeachment Purposes.**

The offer of compromise [Exhibit 3, R. 770] was written after the facilities had been constructed and the contingencies involved in guaranteeing the cost had been eliminated. It was a minimum fee based upon no risk involved. It was not the same minimum fee that would have been fair at the time the agreement was made. The 10 per cent fee was for a guaranteed cost [R. 741].

Assuming, but not admitting, that the offer of compromise would have been admissible for impeachment purposes if the issue in this case had been the amount of a fair supervisory fee, it was not used for that purpose. The question as to what was a fair fee was not in issue, as the Court excluded that issue as being proper only in a Court of Claims action [R. 701-702]. Appellee concedes this (Br. 16). Therefore, it was wholly immaterial for impeachment purposes.

The only use which Appellee made of this offer of compromise was in its argument to the jury. That portion thereof which refers to a fee was used by Appellee's counsel as an admission as to the market value of the leasehold estate. Counsel for Appellee said to the jury with reference thereto:

“Ladies and gentlemen, you are not going to give them more than they asked for, are you, before this lawsuit was brought? And don't forget, that that was only their asking price then” [R. 1265].

“Ladies and gentlemen, on the 24th day of November, 1944, they say, ‘We want you to give us \$80,000 for supervising the putting in of the things you



bought for us to make ships with to sell to you. We want you to give us \$80,000.'

You will have these papers. If that isn't right—if what I have read to you isn't right, throw me out of the window. But, my goodness, are you going to permit those people to go into the treasury of the United States, when we come in here in a condemnation case, and get any more?

Well, if you think they are entitled to that, you give it to them. But if you think that it would be right for me to say to you, 'I want you to spend \$2,700,000 to build me a shipyard to build concrete ships to sell to you at a profit, and then after it is all through and done, I want you to give me \$80,000 for building my own shipyard, and supervising that, and then on top of that I have taken the expenses, I have taken the vacations of my own office force' " [R. 1267].

The \$80,000 fee mentioned in Exhibit 3 was only a part of the consideration which Appellants were asking. There were two other items of consideration [R. 770]. Appellants considered the three items to be worth six or seven hundred thousand dollars [R. 784].

At no time did Appellee's counsel state that it was offered for impeachment purposes as to the amount of a fee. If it was proper to be admitted for that purpose, its admission should have been so limited and counsel should have confined his argument to that. Actually counsel made no argument as to impeachment, but extensively commented on the exhibit as going to the issue of market value of the leasehold. This was very prejudicial. He even inferred to the jury that Appellants had already been compensated for the taking.

IV.

**There Was Prejudicial Error in the Government's  
Argument to the Jury.**

Appellee says this ground for reversal has not been preserved because Appellants made no objection thereto at the time, and cites the general rule set forth in *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 239. An examination of this case reveals that there are exceptions to such rule, dependent upon the facts in the particular case. Apparently it is a matter of degree. If there ever was a cause in which the exception to the rule should be applied, it is this one. The statements were so flagrant and prejudicial that they were incurable. The only reason for objection is to give the Court a chance to cure the prejudicial effect thereof by admonishing the jury to disregard the statements. These statements were such that admonishment would have served no purpose. The damage had been done. To have said anything to the jury, would have only emphasized the prejudicial effect thereof instead of obliterating it. Government counsel must have known they would prejudice the jury. He must have made them with that intent. There was no other reason for making them. This did appeal to the passion and prejudice of the jury. In fact the entire record indicates a studied effort on the part of Government counsel to confuse and prejudice the jury. Appellee's twisted and misstatements of the facts in its Brief indicate a studied effort to now confuse this Appellate Court.

There is ample authority for this Appellate Court to grant a reversal on the impropriety of an argument notwithstanding that no objection was made or exception taken in the trial court.

For example, in *New York Central Railroad Company v. Johnson*, 279 U. S. 310, 318, 73 L. Ed. 707 (1929), counsel for the prevailing party in the trial below made an argument to the jury which was designed to appeal to their passion and prejudice, but counsel for the opposing party did not take exception to that argument as required by statute. The Supreme Court, however, on appeal said:

“Respondents urge that the objections were not sufficiently specific to justify a reversal. But a trial in court is never, as respondents in their brief argue this one was, ‘purely a private controversy . . . of no importance to the public.’ The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence. The public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict uninfluenced by the appeals of counsel to passion or prejudice. (Cases cited.) Where such paramount considerations are involved, the failure of counsel to particularize an exception will not preclude this Court from correcting the error.”

The statements complained of in particular are set forth in Appellants’ Opening Brief on pages 52 and 53, and will not here be repeated. They picture Appellants as war profiteers, assert they made profits with no investment of their own, infer they had already been compensated, and that they now want more of the public’s money for nothing. The statements were not based on facts. We do not deny that Appellants made a profit, but certainly

this Court knows that the statutes on profit limitations on shipbuilding and the renegotiation law took care of any excessive profits. Appellants did make substantial investments of their own and did take substantial risks, but such facts as well as the matter of profits were wholly irrelevant and immaterial to the issue in this case and no evidence was offered in regard thereto.

Counsel's statements should be considered in the light of the times. The country had just emerged from the worst war of all times, with the greatest debt, and talk about war profiteers was common gossip. This jury wasn't going to be a party to any such thing even though the Court had told them that they were not to consider such things in arriving at their verdict. They must have been considered, and would have been considered, regardless of any admonition of the Court. If Appellee's contention be correct that the jury did not render their verdict of zero because Appellants were prohibited from selling, then they must have rendered it because they thought Appellants had already gotten enough out of the war and that they weren't going to be a party to giving them any more regardless of Appellants' legal right thereto. That this did prejudice the jury is evidenced by the amount of the verdict as to National City, as to which no such remarks were made and the jury knew the City was not a war profiteer.

Appellee now attempts to mitigate the prejudicial effect of these statements (Br. 25) by indicating how they might have been applied to other matters. Such other matters were not the issue before the jury, and besides Government counsel actually applied his prejudicial statements to the very matter which the jury were called upon to decide, to wit, the amount of the award for Appellants.



V.

**The Trial Court Erred in Failing to Instruct the Jury  
as to the Legal Effect of Appellants' Lease.**

Appellee says that Appellants were the first to introduce testimony as to the legal effect of the lease. The record proves that this practice was initiated by Appellee [R. 751, 757, 761-765, 771-774]. We submit that this was a part of the design of Appellee's counsel to confuse the jury. That it did confuse the jury is proved by their verdict.

We agree with Appellee (Br. 26) that the true legal construction of the lease was not an issue in the case. But throughout the trial and the argument, Appellee made it an issue in the case. Even the Court by its instructions made it an issue in the case. (See Reply to Point II, *supra*.) How was this jury to know what the issues were other than what they gathered from the questions to the witnesses, the argument of counsel, and the instructions of the Court? They were not supposed to know the law. That Appellee put the legal construction of the lease in issue is conclusively shown by the following statements made by Appellee's counsel in his argument to the jury:

“Every claim that it has in this lawsuit stems from Exhibit W. I say to you that, in reading that document, if you can tell me what it means, then you are probably a better man than I am. I tell you that, if the lawyers can agree on what that document means, they are better lawyers than I am. *So, therefore, their rights stemming from Plancor 407 are what you are to determine.*” (Italics ours.) [R. 1256.]

He then went through the various paragraphs of the lease and gave interpretations thereof that were clearly erroneous [R. 1257-1263], and we give credit to the legal ability of Appellee's counsel by stating that he must have known that they were erroneous.

Then the Court (due unquestionably to the shortness of time because of the necessity of Government counsel leaving for Michigan for another trial [R. 1227]), instead of advising counsel as to what the charge would be [R. 1372] as the Court had previously indicated it would do [R. 1225], proceeded to so instruct the jury that the question as to the legal construction of the lease was left to the jury to determine (Point II, *supra*), instead of the Court telling the jury the proper legal construction of the lease. So far as the jury knew, the legal construction given them by Government counsel was correct, as the Court didn't tell them otherwise, but in effect, by its instructions left it to the jury to determine whether or not Appellants' interest was speculative or conjectural [R. 1293], and whether or not Appellants were prohibited from making a sale [R. 1295-1296, 1303], just as Government counsel had argued [R. 774, 1256-1263]. The Court told them to consider the entire instrument [R. 1295] which certainly meant to a laymen jury that they were to read the lease and if they found any provision therein that prevented a sale and they found that prior consent to a sale had not been obtained, that their verdict must be zero. Paragraph Twenty-four [R. 64] provided that the lease could not be sold without the prior consent of lessor and the evidence was that such consent had not been given [R. 774].

VI.

**The Verdict and Judgment Are Not Supported by the Evidence.**

While Appellants urge in their Opening Brief that the appropriate measure of compensation is the difference between the value of the site, facilities and machinery, and the option price, this measure is applicable only if the option rights are to be compensated for in this proceeding. It would be the minimum amount assuming that Appellants had terminated the leasehold estate on December 23, 1944, and immediately exercised their option, thus waiving all benefits of the leasehold estate. If the option rights are to be preserved for compensation through action in the Court of Claims and compensation for the leasehold estate only is to be determined in this action, then compensation should be measured by the value of the leasehold estate. Argument under this point is confined to the verdict and judgment that the just compensation for Appellants' leasehold estate is nothing.

Appellee argues (Br. 27) that the judgment of nothing is supported by the opinions of its two appraisers, Mr. Shattuck and Mr. Mason. Certainly the opinion of an expert witness as to value, when based upon erroneous premises, is not evidence which will support a verdict or judgment. This is not merely a question of weighing the evidence. To say that it is, is to assume that the opinion would be the same if based upon a correct premise. This would be assuming evidence that is not in the record. A verdict or judgment based upon assumed evidence is not supported by any evidence.

Appellee's two appraisers were well coached. While they admitted time and time again that they did not consider certain features of the lease, and gave reasons for their opinions based upon their erroneous interpretations of the lease, they were well trained to always come up with the same stock answer of zero valuation regardless of the facts or interpretation of the lease [R. 1091-1160, 1161-1206].

The opinions of Appellee's two witnesses should be wholly disregarded. There is at least one important item of value which they wholly overlooked. That is the 100 days minimum right of possession which Appellants had even assuming that the Government had served a ten-day notice of termination on December 23, 1944, instead of filing this action. Appellants unquestionably had that ten days plus the entire 90-day option period that would follow such termination during which they could remain in possession [R. 54-55, 58, 61]. If the Government requested priority, the same result could have been accomplished by Appellants serving a termination notice.

Appellants were in possession, engaged in building and repairing boats for the Government, rent free, of a \$3,000,000 complete shipyard, comprising 100 acres of land, with ship basins, buildings, shops, machinery, trucks, cranes, and equipment. The facilities had been designed for post-war uses as well as war [R. 735-737]. They could use the yard for private purposes by the payment of 10 cents per man hour rent, which was voluntarily offered by Appellants [R. 848]. It amounted to less than



10 per cent of the labor cost. This is very low for land, facilities and equipment. Under such arrangement, these charges did not go on whether there was business or not, but varied with the amount of business done, which is very desirable. Such arrangement must have been profitable to Appellants, otherwise they would not have offered it. They had no property taxes to pay as title was in the Government. They could underbid competitors for Government work who had to pay rent or had a large fixed property investment, which gave them assurance of getting Government work as long as there was any. On December 23, 1944, we were in the "Battle of the Bulge" in Belgium. The outcome of the war looked anything but good for the United States. Everyone expected the war to last a long time. If it did there would be need for more ships. Whether it was to be of long or short duration, there would be need for ship repairs, dismantling, etc., for a long time. Appellants were actually in an enviable position from the standpoint of anyone interested in such business. But the Navy needed this property for its own use. Perhaps the need was determined because the Navy believed the war would last a long time.

This right of possession for a minimum of 100 days was worth something, not nothing. In fact, it had a very substantial value. Even if we just take the ten automobiles and trucks listed in Exhibit Q [R. 1328-1330] we would have a substantial rental value, let alone the other millions of dollars' worth of land, facilities and machinery. To uphold this judgment merely because two real estate men said in their opinions the lease had no value, would be a travesty on justice. This Court knows of its own knowledge that the award is grossly inadequate. We submit that there has been a miscarriage of justice.

VII.

**The Verdict and Judgment Are Contrary to Law.**

Here again Appellee erroneously interprets (Br. 28) the Court's instructions. The Court instructed the jury to award nominal damages for Appellants' leasehold if it could have been sold for a nominal sum only, but to return a verdict of zero if the leasehold could not be sold [R. 1293, 1295-1296]. The former, not the latter, instruction referred to an inability to sell because of a lack of value. The latter referred to the prohibition against selling at all. Possibly the trial court did not so intend it to mean that, but that is what it does mean and certainly the jury so understood it. By awarding Appellants nothing, the jury simply found that no sale could legally be made, not that the leasehold had no value. The jury could not have found that the leasehold had no value. It did have a value and a substantial value, which can not be truthfully denied by anyone, even if confined to the minimum of 100 days possessory use referred to in Point VI, *supra*.

If the jury had found that the leasehold had no value, not because it could not have been sold, but because it had no value to anyone, not even to Appellants, then under the Court's instructions they would have brought in a verdict for a nominal amount.

The question as to whether or not the lease could be sold, was erroneously left to the jury, regardless as to whether the question related to the right to sell or the ability to find a purchaser. The law presumes in a condemnation case both the right to sell and that there is a

purchaser ready, willing and able to buy. The only question to be determined is how much.

If zero is an amount, then it is so grossly inadequate as to shock the conscience of this Court. The very doctrine of just compensation has been thrown to the winds by this judgment. We have found no case where there was something taken that something has not been awarded. The case of *Marion etc. Ry. v. United States*, 270 U. S. 280, 282, cited by Appellee as supporting a judgment of nothing is not in point. In that case the President under his war powers issued a proclamation taking over the railroads, but there was no actual possession taken and the railroad continued under its own management the same as before. The plaintiff claimed a technical taking and that therefore it was entitled to compensation. But the Court held that nothing had been taken from the plaintiff and that therefore nothing was recoverable. In the case at bar, there is no question but what Appellants' leasehold and option rights were taken. These rights were of substantial value, at least to Appellants, and it must be assumed that if they were valuable to Appellants that they would be valuable to a purchaser.

The measure of compensation in a condemnation case is the loss to the property owner. *United States v. Miller*, 317 U. S. 369. There can be no question but what the taking of this lease resulted in a monetary loss to the Appellants. The Court said in *United States v. Petty Motor Co.*, 327 U. S. 372, 378:

"If any property is taken, compensation is required." Appellants are entitled to have the amount thereof determined in this action, be it substantial or nominal.

VIII.

**The Trial Court Did Not Err in Correcting the Judgment to Conform to What the Court Had in Mind Throughout the Trial and in Entering the Judgment.**

The trial court at no time ever ruled, as stated by Appellee (Br. 29), that the option was compensable in this proceeding. On the contrary the Court at all times ruled just the opposite. It is clear from the record that the trial court considered throughout the trial that it was without power in this proceeding to award compensation for the option, that the Court did not permit the introduction of evidence as to the value of the option, that Appellants were confined to the market value of the leasehold estate, that the issue as to the value of the option was never submitted to the jury, and that the Court through inadvertence signed the judgment with the word option in it [R. 700-701, 724-727, 1294, 1431-1432, 1435, 1437, 1438, 1440, 1442].

Certainly the best evidence as to what the Court had in mind is the Court's own statements made at the time he corrected the judgment. The Court said:

“Let me say parenthetically, before we do that, there is a clear indication in the mind of the Court on this question of frustration, and the Court had entertained that throughout the case, that the question of the option was not necessarily correlated, insofar as condemnation was concerned, with the question of the leasehold estate. The question of the leasehold estate, I think, clearly was a matter that was subject to evaluation and award in this condemnation proceeding.

There is nothing in Judge Yankwich's ruling that is counter to that conclusion, in my judgment. There



is not anything in the ruling, either on pretrial by Judge Yankwich or during the rulings on evidence by the trial judge, or during the discussions with counsel in the absence of the jury, at the bench, but what indicates that it was clearly in the mind of the Court that if there be any question of frustration, that we were not in the proper forum in which to ascertain that feature of the case.” [R. 1431-1432.]

\* \* \* \* \*

“In signing this judgment, there appears to be a statement in the judgment that is at variance with the mind of the Court, and was at the time the judgment on the verdict was signed. I will call attention to that.

I want it also noted that the proposed judgment does not appear to have been endorsed by any of counsel for Tavares Construction Company interests.” [R. 1435.]

\* \* \* \* \*

“The Court inadvertently and without any intent to do so signed the judgment with the word ‘option’ in there, in that portion of the judgment.

I think it is clear that the trial court, while following what it conceived to be, and what appeared to it was, the ruling on pretrial, it did not enable this Court in condemnation to fix a value for what may or may not have been the frustration of an option right of the Tavares Construction Company interests. It was and is this Court’s view that there should be no feature of this case that would prevent the interested parties, if any, from litigating as to what this Court conceives and did throughout the trial conceive to be the proper forum.” [R. 1437.]

\* \* \* \* \*

“The matter is how to reach it without, at least seemingly, being contumacious as far as the Court of Appeals is concerned. I do not want the Court of Appeals to feel in any way that this Court, after an appeal had been taken, would feel as though it has jurisdiction in the sense of deciding something differently from what it has always decided.

This Court’s mind has always been centered on the fact that if there was any frustration of this contract it was not a compensable item in an eminent domain case. The deadline occurred on December 23, 1944, and that deadline was occasioned by the activity of the Government in taking over the leasehold. The question is if this is of an equitable character that could be reached in the Court of Claims on the theory of frustration of a contract. That, of course, is not one of those items that could be properly evaluated in an eminent domain proceeding.” [R. 1438.]

\* \* \* \* \*

“The Court: I do not want to do this: I do not want either the litigants or any reviewing authority, or any other applicable judicial authority, to get the impression that this Court is changing its mind in the case or that it has any doubt but what it gave to the jury the law of the case in its instructions. I think I have shown that by the excerpts that have been read, and there are others that will substantiate that. There is nothing I have found that would operate to remove that impression. That was never in the mind of this Court, that any question of frustration of contract was litigated and terminated and adjudicated in this action of eminent domain.” [R. 1440.]

The judgment was in error in including the option, as the case had been in fact tried on the theory that the option was not included, no evidence was received for the

purpose of awarding compensation for the option, and there was nothing upon which the jury could evaluate the option. The jury were instructed to make their award the market value of the leasehold estate [R. 1294].

The Court had by the very terms of the judgment, paragraph 14 thereof, specifically retained jurisdiction for the purpose of making such further orders, judgments and decrees as may be necessary in the premises [R. 328].

All that the Court did was to make the judgment speak the truth. The judgment said something which the Court said was erroneous and which he did not intend to say, and which he inadvertently signed. The Court corrected this error.

The Court also had jurisdiction to correct this error under either Rule 60 of the Federal Rules of Civil Procedure, if applicable, or if not applicable, then under Sec. 473 of the California Code of Civil Procedure. Since an appeal had been taken, it in any event had jurisdiction under Rules 75(h) and 81(7) of the Federal Rules of Civil Procedure. Rule 81(7) makes the Federal Rules applicable to proceedings on appeal in condemnation cases and Rule 75(h) authorized the Court to make this correction, since an appeal had been taken.

As we have hereinbefore pointed out in other portions of this brief, the Court created no disparity between the issues tried and the judgment by correcting the judgment. The correction merely eliminated the disparity between the issues tried and the judgment which existed before the correction was made.

Certainly this Appellate Court is not going to enforce a judgment which the Trial Court says it signed through inadvertence and which was not the Court's judgment.

Conclusion.

We respectfully submit that the Appeal of Tavares Construction Company, Inc. *et al.*, should be allowed, the Cross-Appeal of the United States should be denied, and the case should be remanded to the District Court for a retrial, together with appropriate instructions to award compensation for both the leasehold estate and the option rights to the same extent as if the action were in the Court of Claims.

Respectfully submitted,

JOHN M. MARTIN,

FRANK L. MARTIN, JR.,

*Attorneys for Appellants and Cross-Appellees.*





IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA,

*Appellant,*

*vs.*

TAVARES CONSTRUCTION COMPANY, INC., a corporation,  
LLOYD S. STROUD, R. S. SEABROOK, C. M. ELLIOTT,  
CARLOS TAVARES, HENRY M. PAGE and DON F. GATES,

*Appellees.*

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TAVARES CONSTRUCTION COMPANY, INC., a corporation,  
LLOYD S. STROUD, R. S. SEABROOK, C. M. ELLIOTT,  
CARLOS TAVARES, HENRY M. PAGE and DON F. GATES,

*Appellants,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

Petition for Rehearing of Appellants Tavares Construction Company, Inc., a Corporation, Concrete Ship Constructors, a Joint Venture, Stroud-Seabrook, a Copartnership, Lloyd S. Stroud, R. S. Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page and Don F. Gates.

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No. 11820

IN THE

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*To the Honorable United States Court of Appeals for the Ninth Circuit:*

Come now your petitioners Tavares Construction Company, Inc., a corporation, Concrete Ship Constructors, a

joint venture, Stroud-Seabrook, a copartnership, Lloyd S. Stroud, R. S. Seabrook, C. M. Elliott, Carlos Tavares, Henry M. Page and Don F. Gates, appellants and defendants, hereinafter called Constructors, and respectfully petition for a rehearing in the above case, in which the opinion was filed on the 16th day of June, 1949, and as grounds for rehearing, assign the following:

I.

**The Court Erred in Holding That Constructors' Leasehold Estate and Option Were Not Condemned or Taken in This Proceeding.**

This action was originally commenced for the purpose of acquiring land for the site of a shipyard for use by Constructors [R. 20]. Two declarations of taking were filed. The first took the title to all parcels excepting Parcel 1 [R. 28-32]. Plancor 407 was not specifically mentioned therein [R. 29]. The second was an amended declaration and covered all parcels [R. 42-46]. It specifically mentioned Plancor 407 therein [R. 43].

The filing of an amended declaration of taking as to all parcels and the mention therein of Plancor 407 indicated an intent to take not only the additional Parcel 1 but also the interests of Constructors under Plancor 407 as to all of the parcels.

Shortly thereafter an amended and supplemental complaint was filed [R. 249-258] which contained the same description as to the property and interests therein sought to be condemned as was set forth in the amended declaration of taking [R. 253-255]. The filing of the amended and supplemental complaint certainly indicated an intent to take something in addition to that contemplated by the

original complaint. If Constructors' interests under Plancor 407 were not intended to be taken thereby, then there was no necessity for an amended and supplemental complaint, or for an amended declaration of taking. If all that was intended to be taken by the amended declaration of taking was National City's interest in Parcel 1, then it would have been Declaration of Taking No. 2, which would have been in the same language as Declaration of Taking No. 1, and described only Parcel 1.

To eliminate any uncertainty as to whether or not it was the intent of the amended declaration of taking and the amended and supplemental complaint to take and condemn Constructors' interests under Plancor 407, Constructors made a motion for a more definite statement [R. 259-264]. This motion was granted [R. 265], and the United States filed a bill of particulars which made it certain that the United States by its amended and supplemental complaint sought to take and condemn all of Constructors' interests [R. 266-267].

Thereafter on pre-trial the court interpreted the pleadings and ruled that Constructors' lease and option rights had been taken and condemned by this action and that Constructors had a compensable interest in the property taken by this condemnation proceeding [R. 310].

The action thereafter proceeded to trial upon that theory and understanding by the trial court and both parties [R. 311-312]. No contention was made by either party or the trial court that Constructors' leasehold estate under Plancor 407 had not been condemned or taken by this proceeding. On the contrary, it was stipulated by the parties that December 23, 1944, was the date of taking of



Constructors' lease, coupled with an option [R. 401], which was the date of the filing of the amended declaration of taking.

The trial court entered judgment finding that Constructors' leasehold and option rights under Plancor 407 had been condemned and taken by this proceeding, that title thereto was vested in the United States, and that Constructors' lease and option covered all twelve parcels [R. 314, 317, 319, and 327]. Later the trial court corrected the judgment by striking the word "option" therefrom [R. 389 and 1418 to 1448].

On appeal neither party has contended that Constructors' rights under Plancor 407 were not taken. On the contrary, both parties in their briefs have taken the position that Constructors' leasehold estate and option had been taken and condemned by this proceeding. (See Brief of Constructors, p. 10, and Brief of United States, pp. 3 and 6.) In connection with the pre-trial, a stipulation of the parties was filed by which it was stipulated that subsequent to the entry of the decree on the declaration of taking that the Navy Department took physical possession of a major portion of the site and destroyed approximately one-third of the improvements and facilities [R. 299]. Such conduct on the part of the Government clearly indicates that the Government intended to take Constructors' rights by the declaration of taking.

This court has decided this case upon a point that was not only not raised by either party on the appeal but which was expressly conceded by both parties not to be an issue in the case, and upon a theory contrary to that on which it was tried and contrary to the understanding of the trial court and the parties of the pleadings. In

doing so the court erred. In support thereof we submit the following authorities:

*Martin v. Imbrie* (C. C. A. 7th), 262 Fed. 44.

Syllabus—"Where a case is tried on a theory that a particular matter is within the issues, it cannot be contended on appeal that such matter was without the pleadings."

*Meyer v. W. R. Grace & Co.* (C. C. A. 7th), 290 Fed. 785.

Syllabus—"Where the trial court's theory as to the effect of the pleadings was not objected to by defendants, they could not urge such an objection on writ of error."

*Houle v. Helena Gas & Elect. Co.* (C. C. A. 9th), 31 F. 2d 671.

Syllabus—"Practical construction of complaint by court, which construction was accepted by parties throughout the trial will be accepted by the Appellate Court."

This court has further erred in that its decision is based solely upon an interpretation of the amended declaration of taking without considering the amended and supplemental complaint and bill of particulars. There can be no doubt but that it was intended by the amended declaration of taking to take Constructors' leasehold estate when the amended declaration of taking is read in the light of the fact that it was an amended declaration of taking, which specifically mentioned Plancor 407 and repeated the description of all of the parcels, and when also considered with the fact that a supplemental complaint was thereafter filed, together with the clarification thereof by the bill of particulars.

In any event it was clearly sought by the amended and supplemental complaint as clarified by the bill of particulars to condemn Constructors' leasehold estate under Plan-cor 407 [R. 266, 267]. Rule 12(e) of the Federal Rules of Civil Procedure provides among other things: "A bill of particulars becomes a part of the pleading which it supplements." This proceeding was instituted at the instance of the Maritime Commission [R. 6 and 252] and at the time of the hearing upon the motion for the bill of particulars counsel for the United States submitted to the court a letter written by the Solicitor for the Maritime Commission to the Attorney General advising that it was "the intention of the Maritime Commission to acquire full title to the land and all improvements thereon, and thereby to acquire any and all rights in and to said land and improvements other than those of the United States or its agent, Defense Plant Corporation" [R. 280].

Section 258a of Title 40, U. S. C. A., authorizing the filing of a declaration of taking, is permissive only and does not make inoperative Section 258, the Conformity Act, *United States v. 76800 Acres, etc.* (D. C., Ga., 1942), 44 Fed. Supp. 653. Section 258a is not a complete condemnation statute, but merely supplements existing legislation by granting the United States the power to secure immediate title. (*United States v. 17280 Acres, etc.* (D. C., Neb., 1942), 47 Fed. Supp. 267. The filing of a declaration of taking is optional with the Government and purely incidental to the main proceeding. (*United States v. 26.3765 Acres, etc.* (D. C., N. Y., 1945), 62 Fed. Supp. 910.) It is an ancillary proceeding. (*Polson Logging Co. v. U. S.* (C. C. A. 9th, 1945), 149 F. 2d 877.)

We submit that what is sought to be condemned by an action should be determined from the pleadings. Section 258, 40 U. S. C. A.; Section 1224, California Code of Civil Procedure; *U. S. v. Certain Parcels of Land in City of Los Angeles* (D. C. S. D. Cal., 1945), 62 Fed. Supp. 1017. If a declaration of taking is filed which by its terms takes a lesser interest than that included in the pleadings, the effect thereof is to vest title immediately in the United States to the extent indicated by the declaration of taking and to leave the remaining interest to vest on the entry of judgment in the action. In this case all of Constructors' interests and rights under Plancor 407 were taken and condemned by the pleadings. It is also clear that the United States took and condemned all of Constructors' interests and rights under Plancor 407 by the amended declaration of taking. It was stipulated by the parties at the time of trial that December 23, 1944, was the date of taking of Constructors' lease, coupled with an option [R. 401]. The parties interpreted the amended declaration of taking as taking Constructors' leasehold estate and option rights under Plancor 407, and we believe this court is bound by the interpretation placed thereon by the parties. The amended declaration of taking took the "fee simple absolute" title, excepting only the title which had already vested in the United States or its agent Defense Plant Corporation. This completely divested Constructors of their interests. (See *United States v. Sunset Cemetery Co.* (C. C. A. 7th, 1943), 132 F. 2d 163.



## II.

### The Court Erred in Holding That the Site Was Limited to Parcel 1.

This holding was based upon the court's erroneous assumption that what was included in the word "Site" in the original Plancor 407 was not changed by any of the amendments thereto. The court has evidently overlooked Amendment No. 5 [R. 87-89] to Plancor 407 made November 11, 1942, being the day following the commencement of the condemnation action. This amendment recited the need for additional facilities and provided:

\* \* \* \* \*

"Whereas, the Government is proceeding to acquire title to additional land to be used as a part of the Site for the facilities \* \* \* (such land and the balance of the land heretofore constituting the Site being hereinafter referred to as 'the Site'); and

Whereas, upon acquisition of title to such additional land by the Government the Maritime Commission has indicated that it will cause the same to be conveyed to Defense Corporation upon receipt of payment of the cost thereof;

Now, Therefore, in consideration of the premises it is agreed by and between the parties hereto that said Agreement of Lease entered into on December 27, 1941, by and between Defense Corporation and Lessee, as amended, be and the same hereby is further amended in the following particulars:

\* \* \* \* \*

Thirteen: In consideration of the covenants herein contained, and as rental for the Site, Facilities and Machinery (in addition to the rental for that part of the Site which Lessee leased from National City, California, \* \* \*), Lessee agrees to pay to Defense Corporation \* \* \*.

By adding thereto the following new paragraph  
Thirty-one:

Thirty-one: Lessee agrees that when Defense Corporation shall have acquired title to that part of the Site now being condemned by the Government, the Agreement of Lease, dated December 27, 1941, as amended, shall be further amended so as to provide for an increase in the maximum amount of expenditures to be made by Defense Corporation in the amount of the cost thereof to Defense Corporation (which amount shall not exceed the cost thereof to the Government), and an increase in the amount of rental to be paid by Lessee under said Agreement of Lease, as amended, in an amount sufficient to cover the cost of such part of the Site. Lessee further agrees that in the event the property leased to Lessee under said Agreement of Lease, as amended, should be transferred to another branch of the Government pursuant to paragraph Twenty-six thereof prior to the acquisition by Defense Corporation of title to that part of the Site now being condemned by the Government, Lessee will, if it should thereafter elect to exercise the option to purchase conferred by paragraph Fifteen of said Agreement of Lease, as

amended, pay to the Government the cost to it of such part of the Site on the same basis as if such cost had been part of the cost to Defense Corporation of the property leased to Lessee under said Agreement of Lease, as amended.

\* \* \* \* \* \*” [R. 87-89]

From the foregoing it is clear that the word “Site” as used in the original Plancor was amended to include not only the original site, but all of the land involved in the condemnation action. Means were provided for Defense Corporation to acquire title to all of the land being condemned and when it did acquire such title Plancor 407 was to be further amended so as to add the cost thereof to the total expenditures to be made under Plancor 407. This automatically increased the option price for the Site under Paragraph Fifteen of Plancor 407. In the event Defense Corporation transferred Plancor 407 to another branch of the Government before Defense Corporation acquired title to the land being condemned, then in the event Constructors exercised their option, they were to pay to the Government the cost to it of that part of the Site being condemned.

On October 3, 1944, the fee title to Parcels 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and A vested in the Government. On December 23, 1944, title to Parcel 1 vested in the Government. Thus when Constructors’ interests were taken, title to these lands was in the Government. The Government was the principal, and Defense Corporation and the Mari-

time Commission were its agents. The condemnation by the principal was instituted by its agent the Maritime Commission for the benefit of its agent Defense Corporation. The Government is bound by the acts of its agents. Constructors acted on their promises and, in good faith and in reliance thereon, constructed shipyard facilities on the land being condemned, with the understanding that they did have a leasehold interest thereon and an option to purchase the fee title to all twelve parcels and all facilities and machinery thereon. The Government has not denied this, but on the contrary has affirmatively taken the position throughout this proceeding that Constructors had a valid and enforceable leasehold estate on all twelve parcels of land, together with the facilities and machinery located thereon, and an option to purchase the fee title to the whole thereof. It was so agreed by the parties in the pre-trial stipulation [R. 298-299]. We do not see how this court can take a contrary view. Certainly all of these agreements meant something and were not mere idle words and surplusage.

The error in the decision as to the extent of the "Site" should be corrected, even though the court is still of the opinion that Constructors' interests were not taken, in order to avoid any possible prejudice to such rights as Constructors may have under Plancor 407 in some other proceeding.



### III.

#### Constructors' Option to Purchase the Site, Facilities and Machinery Was Condemned and Taken in This Procedure.

The court states that there is no contention or basis for contending that the Facilities and Machinery which were located on the site and were personal property were condemned or taken in this proceeding. This is true in the sense that there was no direct condemnation thereof, because title thereto was already vested in the Government under the terms of Plancor 407.

However, Plancor 407 was a leasehold estate on land and personal property. One of the covenants in that lease was an option to purchase not only the fee title to the site and the improvements to the site that were a part of the land, but also the personal property located thereon and belonging to the Government. When that leasehold estate was condemned and taken, all of the covenants of the lease went with it. In determining the value of the leasehold estate, the existence of the option is a matter to be considered by experts in determining the value of the property taken, which is a question of fact for the trial court. *United States v. Sunset Cemetery Co.* (C. C. A. 7th, 1943), 132 F. 2d 163; *Brooklyn Eastern Dist. Terminal v. City of New York* (C. C. A. 2d, 1944), 139 F. 2d 1007; *Westchester County Park Commission v. United States* (C. C. A. 2d, 1944), 143 F. 2d 688; *Brooks-Scanlon Corporation v. United States* (1924), 265 U. S. 106; Opinion of Judge Yankwich on Pre-Trial [R. 307-309].

Thus in determining the value of the leasehold estate, the added value to the lease given by the option to purchase

the Site, Facilities and Machinery, must be considered, and it is immaterial whether such option to purchase involves real or personal property or both. Here the option involved both, but under the terms thereof, it was "to purchase all but not part of the Site, Facilities and Machinery" [R. 58]. It was therefore not severable.

We submit that when this leasehold estate was taken, that all of Constructors' option rights were also taken and that those option rights embraced the fee simple title to all twelve parcels of land and all facilities and machinery located thereon. Both parties have so contended in their briefs.

#### IV.

#### **The Court Erred in Holding That Constructors' Contracts With the Maritime Commission Were Not Contracts With the Government.**

The United States Maritime Commission is an agency of the Government (46 U. S. C. A., Sec. 1111). In any event the words "contracts with the Government" were used in Plancor 407 by the parties as including contracts with the Maritime Commission. Plancor 407 was entered into at the instance of the Maritime Commission (see Article 2 of the first concrete barge construction contract between the Commission and Constructors dated November 27, 1941) [R. 99]. Plancor 407, dated December 27, 1941, refers to the Maritime Commission [R. 49] and recites that Constructors have entered into a "contract or contracts with the Government for the construction of concrete barges" and speaks of "the price charged the Government for the construction of such barges" [R. 50]. These contracts were with the Maritime Commission.

We submit that all of the contracts of Constructors with either the Maritime Commission or Defense Plant Corporation, shown by the record, were Government contracts. They were made by Government agencies, for Government purposes, and involved the expenditure of Government moneys. This court should take judicial notice of the fact that all contracts with a Government agency are commonly and customarily referred to as Government contracts. No contention has been made by the United States that Constructors' contracts with the Maritime Commission were not Government contracts.

## V.

### **The Court Erred in Vacating Paragraphs 9 and 11 of the Judgment.**

Paragraph 9 of the judgment relates to all parties to the action. Furthermore it is correct and should remain therein.

Paragraph 11 of the judgment is correct and should remain therein.

Paragraph 10 of the judgment should be vacated and the case remanded to the trial court for a new trial on the issue of just compensation for the condemnation and taking of all of Constructors' leasehold and option rights under Plancor 407.

The order of this court is uncertain in that while it vacates paragraphs 9, 10, and 11 of the judgment, it leaves the recitals [R. 311-313] and Findings I, VII, X, and XI in the judgment [R. 314-320] to the effect that Constructors had leasehold and option rights on all of the property and that such rights were taken and condemned by this proceeding.

### Conclusion.

Appellants (Constructors) pray that a rehearing be granted, that the judgment of the trial court be reversed and the cause remanded to the trial court for a new trial on the issue as to the amount of just compensation to be awarded to Constructors.

Respectfully submitted,

JOHN M. MARTIN,

FRANK L. MARTIN, JR.,

*Attorneys for Petitioners.*

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### Certificate of Counsel.

I, the undersigned, Frank L. Martin, Jr., one of the attorneys for petitioners herein, hereby certify that in my judgment the foregoing petition for a rehearing is well founded, and that it is not interposed for delay.

FRANK L. MARTIN, JR.





No. 11821

United States  
Circuit Court of Appeals

For the Ninth Circuit.

*See vol. 2512*

DAWSON COUNTY, MONTANA,

Appellant,

vs.

MARY HAGEN, E. B. CLARK and MINNIE R. EVANS, on  
their own behalf and on behalf of all bondholders of the  
Upper Glendive-Fallon Irrigation District of the State of  
Montana, and UNITED STATES OF AMERICA,

Appellees,

and

MARY HAGEN, E. B. CLARK and MINNIE R. EVANS, on  
their own behalf and on behalf of all bondholders of the  
Upper Glendive-Fallon Irrigation District of the State of  
Montana,

Appellants,

vs.

EDNA YALE, ALLEN W. YALE and RUBY YALE, his wife,  
and RUTH PETTERSON and HANS PETTERSON, her  
husband, THE SCOTTISH AMERICAN MORTGAGE  
COMPANY, LIMITED, UNITED STATES OF AMER-  
ICA, DAWSON COUNTY and PRAIRIE COUNTY,

Appellees.

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Transcript of Record

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Upon Appeals from the District Court of the United States  
for the District of Montana

FILED  
MAR -4 1948



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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DAWSON COUNTY, MONTANA,

Appellant,

vs.

MARY HAGEN, E. B. CLARK and MINNIE R. EVANS, on  
their own behalf and on behalf of all bondholders of the  
Upper Glendive-Fallon Irrigation District of the State of  
Montana, and UNITED STATES OF AMERICA,

Appellees,

and

MARY HAGEN, E. B. CLARK and MINNIE R. EVANS, on  
their own behalf and on behalf of all bondholders of the  
Upper Glendive-Fallon Irrigation District of the State of  
Montana,

Appellants,

vs.

EDNA YALE, ALLEN W. YALE and RUBY YALE, his wife,  
and RUTH PETTERSON and HANS PETTERSON, her  
husband, THE SCOTTISH AMERICAN MORTGAGE  
COMPANY, LIMITED, UNITED STATES OF AMERICA,  
DAWSON COUNTY and PRAIRIE COUNTY,

Appellees.

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Transcript of Record

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Upon Appeals from the District Court of the United States  
for the District of Montana

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Thereafter, on March 27, 1944, an Amended Complaint was duly filed herein, being in the words and figures as follows, to-wit: [6\*]

The United States of America, in the United States  
District Court, District of Montana, Billings  
Division

Civil No. 348

THE UNITED STATES OF AMERICA,  
Plaintiff,

vs.

PAUL T. MARKEY, et al.,  
Defendants.

### AMENDED COMPLAINT

The plaintiff, by leave of Court first had and obtained, files its second amended complaint herein, and complains and alleges:

#### I.

That the plaintiff, the United States of America, a sovereign, at the request of the Secretary of Agriculture of the United States of America, and under the instructions of the Attorney General of the United States of America, acting by and through John B. Tansil, United States Attorney for the District of Montana, and C. W. Buntin, Special Assistant to the United States Attorney, brings this action.

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\*Page numbering appearing at foot of page of original certified Transcript of Record.

## II.

That by an Act of Congress approved August 1, 1888 c. 728 (25 Stat. L. 357), it is provided:

“That in every case in which the Secretary of the Treasury or any other officer of the Government has been or hereafter shall be authorized to procure real estate for the erection of a public building or for any other public uses he shall be and hereby is, authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the United States Circuit or District Courts of the District wherein such real estate is located, shall have jurisdiction of proceedings for such condemnation, and it shall be the duty of the Attorney General of the United States upon every application of the Secretary of the Treasury under this Act, or such other officer, to cause proceedings to be commenced for condemnation within thirty days from the receipt of the application of the Department of Justice.”

## III.

That pursuant to the provision of the Act of October 14, 1940, (54 Stat. 1119) and by virtue of an Act of Congress approved August 1, 1888 (24 Stat. 357) hereinabove set forth in part, the Secretary of Agriculture is authorized to acquire lands by purchase, gift, judicial proceedings and other-

wise, for the public use, in pursuance of the Act of October 14, 1940, and above referred to, and has determined that it is necessary and advantageous and to the best interest of the Government to acquire title to the lands hereinafter described, for the public use, under judicial process, and that the public use or uses for which said lands are being taken and condemned are as follows, to wit: For the construction, operation and maintenance of project for utilization, reclamation and irrigation of arid and semi-arid lands and to further an effective rehabilitation program and stabilization of the agricultural economy settlement of citizens on lands reclaimed and irrigated and for the improvement of lands within the project's boundaries and all things incidental thereto and the Secretary of Agriculture has determined that it is necessary and advantageous and in the best interest of the United States to acquire title to the lands hereinafter described by condemnation under the judicial process and has made application to the Attorney General of the United States to cause proceeding to be instituted in pursuance of which application the Attorney General has instructed and directed John B. Tansil, United States Attorney for the District of Montana, and C. W. Buntin, Special Assistant to the United States Attorney, to institute these proceedings.

#### IV.

That the lands or real estate sought to be acquired in [9] this proceeding are situated in the Counties of Dawson and Prairie, State of Mon-

tana, and that that portion of the lands lying in the County of Dawson, State of Montana, are designated and described as follows, to wit:

Tract No. 494-1

South half ( $S\frac{1}{2}$ ) of Section One (1), in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana.

Tract No. 494-2

South half of the Southwest quarter ( $S\frac{1}{2}SW\frac{1}{4}$ ) of Section Ten (10) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana.

Tract No. 494-3

South half of the Southeast quarter ( $S\frac{1}{2}SE\frac{1}{4}$ ) of Section Ten (10) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana.

Tract No. 494-4

South half ( $S\frac{1}{2}$ ) of Section Eleven (11), Lots Two (2) and Three (3), Northwest quarter of the Northwest quarter ( $NW\frac{1}{4}NW\frac{1}{4}$ ) of Section Thirteen (13) all of fractional Section Twenty-one (21) and Lot Eight (8) of Section Twenty-three (23) all in Township Thirteen (13) North of Range Fifty-Three (53) East of the Montana Principal Meridian, Montana.



## Tract No. 494-5

Northwest quarter ( $NW\frac{1}{4}$ ) West half of the Northeast quarter ( $W\frac{1}{2} NE\frac{1}{4}$ ) of Section Twelve (12) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana.

## Tract No. 494-6

Southwest quarter ( $SW\frac{1}{4}$ ) of Section Twelve (12) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana.

## Tract No. 494-7

Lots One (1), Two (2), Three (3), and Four (4) of Section Twelve (12) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana.

## Tract No. 494-8

Lots One (1), and Two (2), North half of the Southwest quarter ( $N\frac{1}{2} SW\frac{1}{4}$ ) of Section Fourteen (14) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana.

## Tract No. 494-9

Southwest quarter of the Northeast quarter ( $SW\frac{1}{4} NE\frac{1}{4}$ ) and Southeast quarter of the Northeast quarter ( $SE\frac{1}{4} NE\frac{1}{4}$ ), Northwest quarter of the Northeast quarter ( $NW\frac{1}{4} NE\frac{1}{4}$ ), North half of the Southeast quarter ( $N\frac{1}{2} SE\frac{1}{4}$ ) and Lot Three (3) of Section Fourteen (14) in Township

Thirteen (13) North of Range Fifty-three (53)  
East of the Montana Principal Meridian, Montana.

Tract No. 494-10

Northwest quarter (NW $\frac{1}{4}$ ) of Section Fourteen (14) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana.

Tract No. 494-11

All of Section Fifteen (15) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana.

Tract No. 494-12

Southwest quarter (SW $\frac{1}{4}$ ), that part of the Southeast quarter of the Northwest quarter (SE $\frac{1}{4}$  NW $\frac{1}{4}$ ) lying southeast of U. S. Highway No. 10, and more particularly described as follows:

Beginning at the southeast corner of the SE $\frac{1}{4}$  NW $\frac{1}{4}$ , thence west along the south line of said SE $\frac{1}{4}$  NW $\frac{1}{4}$  a distance of 1320 feet thence north along the west line of said SE $\frac{1}{4}$  NW $\frac{1}{4}$  a distance of 931.5 feet to the south line of U. S. Highway No. 10, thence north 67° 14' east along the south line of said highway a distance of 919.9 feet to its intersection with the North line of said SE $\frac{1}{4}$  NW $\frac{1}{4}$ , thence east along the north line of said SE $\frac{1}{4}$  NW $\frac{1}{4}$  a distance of 438.5 feet, thence south along the east line of said SE $\frac{1}{4}$  NW $\frac{1}{4}$  a distance of 1320 feet to the point of beginning, containing 35.85 acres, more or less, all in Section Sixteen (16), Township Thirteen (13) North of Range Fifty-

three (53) East of the Montana Meridian, Montana.

Tract No. 494-13

Lots One (1), Two (2), Three (3), Four (4), Northwest quarter of the Northeast quarter ( $NW\frac{1}{4}$   $NE\frac{1}{4}$ ), North half of the Northwest quarter ( $N\frac{1}{2}$   $NW\frac{1}{4}$ , Southwest quarter of the Northwest quarter ( $SW\frac{1}{4}$   $NW\frac{1}{4}$ ) of Section Twenty-two (22) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Meridian, Montana.

Tract No. 494-14

Lots One (1), Two (2), Three (3), Four (4), Five (5), Six (6), Seven (7), Eight (8), Eleven (11), Twelve (12), Thirteen (13), Southeast quarter of the Northwest quarter ( $SE\frac{1}{4}$   $NW\frac{1}{4}$ ), Northeast quarter of the Southwest quarter ( $NE\frac{1}{4}$   $SW\frac{1}{4}$ ) of Section Six (6), in Township Thirteen (13) North of Range Fifty-four (54) East of the Montana Meridian, Montana.

Tract No. 1-27

That portion of the Northwest quarter ( $NW\frac{1}{4}$ ) lying northerly of the following described line: Beginning at a point on the west line of said Section Sixteen (16), which point lies south 2262.5 feet from the northwest corner of said Section 16, thence north  $67^{\circ} 14'$  East a distance of 2863 feet to a point on the east line of said  $NW\frac{1}{4}$  which point lies south 1154.5 feet from the northeast corner, of the  $NW\frac{1}{4}$  of Section 16 in Township Thir-

teen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana.

Tract Nos. 1-47 and 1-53

Lot Four (4) and the Northeast quarter of the Northeast quarter ( $NE\frac{1}{4}$   $NE\frac{1}{4}$ ) of Section Fourteen (14) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana. [11]

And that portion of the lands situate in the County of Prairie, State of Montana, to wit:

Tract No. 511-1

North half of the Northeast quarter ( $N\frac{1}{2}$   $NE\frac{1}{4}$ ), West half of the Southwest quarter ( $W\frac{1}{2}$   $SW\frac{1}{4}$ ) of Section Twenty (20) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana.

Tract No. 511-2

East half of the Southwest quarter ( $E\frac{1}{2}$   $SW\frac{1}{4}$ ), Southeast quarter ( $SE\frac{1}{4}$ ), South half of the Northeast quarter ( $S\frac{1}{2}$   $NE\frac{1}{4}$ ) of Section Twenty (20) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana.

Tract No. 511-3

Lots One (1), and Two (2), of Section Twenty-eight (28) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana.



## Tract No. 511-4

Lost Two (2), Three (3), and Four (4), Northwest quarter ( $NW\frac{1}{4}$ ), North half of the Northeast quarter ( $N\frac{1}{2} NE\frac{1}{4}$ ) and Northwest quarter of the Southwest quarter ( $NW\frac{1}{4} SW\frac{1}{4}$ ) less one acre in the extreme northwest corner of the Southeast quarter of the Northwest quarter ( $SE\frac{1}{4} NW\frac{1}{4}$ ), said tract being dimensions of ten rods north and south by sixteen rods east and west in Section Twenty-nine (29) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian.

## Tract No. 511-5

Southeast quarter of the Southeast quarter ( $SE\frac{1}{4} SE\frac{1}{4}$ ) of Section Thirty (30) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana.

## Tract No. 511-6

Lots Three (3) and Four (4) of Section Thirty (30) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana.

## Tract No. 511-7

Northeast quarter ( $NE\frac{1}{4}$ ) of Section Thirty (30) North half of the Southeast quarter ( $N\frac{1}{2} SE\frac{1}{4}$ ) of Section Thirty (30) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana.

## Tract No. 1-12

Lots One (1), and Two (2) and the East half of Northwest quarter ( $E\frac{1}{2}$  NW $\frac{1}{4}$ ) of Section Thirty (30) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana,

containing in all 5,788.21 acres, more or less.

That each of the said tracts of land is a separate and distinct tract of land and not part of a larger tract and that plaintiff is acquiring the lands and all the interest whatsoever; [12] of the owners therein, in fee simple by condemnation for the public use, subject, however, to existing rights of way for easements for any highway purposes, existing rights of way for telephone lines, electric light and power lines, irrigation and drainage systems and ditches, and also subject to the outstanding rights, if any, under the reservations and exceptions contained in the patents from the United States and the State of Montana, including all improvements whatsoever kind or nature, upon the said lands appurtenant thereto and subject to all reservations of minerals of plaintiff, the United States of America, in patents issued.

## V.

That money has been appropriated and is available when needed to pay for the lands being condemned.

## VI.

(1) That the defendant, Paul T. Markey, claims or may claim an interest in the lands and premises

above described and designated as tract 494-1, as owner or otherwise;

And that the defendant, Mrs. Paul T. Markey, wife of Paul T. Markey, if any, claims or may claim some interest in the tract above described and designated as tract 494-1, by virtue of the relation of wife or otherwise;

(2) That the defendant, Oscar R. Wilburn, claims or may claim an interest in the lands and premises above described and designated as tract 494-1 as owner or otherwise;

And that the defendant, Mrs. Oscar R. Wilburn, wife of Oscar R. Wilburn, if any, claims or may claim an interest in the lands above described and designated as tract 494-1, by virtue of the relation of wife, or otherwise;

(3) That the defendants, Eva Lee, Florence Dion, Mathilda Powderly, Mae Carlisle, Edwin Powderly and Eugene Powderly, claim or may claim an interest in the lands above described designated as tract 494-2, as owners or otherwise;

And that the defendants, Mrs. Edwin Powderly, wife of Edwin Powderly, if any, claims or may claim an interest in the lands above described and designated as tract 494-2, by virtue of the relation of wife, or otherwise;

(4) That the defendant, L. A. Fisher, claims or may claim an interest in the lands and premises above described and [13] designated as tract 494-2, as mortgagee, or otherwise;

And that the defendant, Mrs. L. A. Fisher, wife

of L. A. Fisher, if any, claims or may claim some interest in the tract above described and designated as tract 494-2, by virtue of the relation of wife or otherwise;

(5) That the defendant, Scottish American Mortgage Company, Limited, is a corporation organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, and that it claims or may claim the lands above described or an interest therein, designated and described as tracts 494-3, 494-9, 1-47 and 1-53, as owner or otherwise;

(6) That the defendant, O. M. Corwin, claims or may claim an interest in the lands above described designated as tracts 494-4 and 511-4, as owner or otherwise;

And that the defendant, Mrs. O. M. Corwin, wife, if any, of O. M. Corwin, claims or may claim an interest in the lands and premises above described designated as tracts 494-4 and 511-4 by virtue of the relation of wife or otherwise;

(7) That the Northern Pacific Railroad Company is a corporation organized under the laws of the State of Wisconsin and that it is the record owner of Lot 8 of Section 23, Township 13 North of Range 53 East, and claims or may claim the same as owner or otherwise;

(8) That Joseph Fountain died on May 28th, 1942, in the County of McCone, State of Montana. That as affiant is informed and believes, he died intestate; that his estate has been duly administered



upon in the District Court of the Seventh Judicial District in and for the County of McCone and that as affiant is informed and believes and as the record discloses, he left as his whole and only heirs at law the following named persons, to wit; David Fountain, Willard Fountain, George Fountain and Albert Howard, a minor, named as defendants herein, and that they and each of them claim or may claim some interest in the lands described and designated herein as tract 494-5.

That M. E. Howard is the duly appointed, qualified and acting guardian of the defendant, Albert Howard, a minor, and as guardian of Albert Howard, a minor defendant named herein, claims or may claim some interest as such guardian in tract designated [14] and described as tract number 494-5.

That the defendant, Mrs. David Fountain, wife if any, of David Fountain, claims or may claim some interest in tract designated number 494-5, by virtue of the relation of wife, or otherwise; and that the defendant, Mrs. Willard Fountain, wife, if any, of Willard Fountain, claims or may claim some interest in tract No. 494-5, by virtue of the relation of wife or otherwise; and that the defendant, Mrs. George Fountain, wife, if any, of George Fountain, claims or may claim some interest in tract designated No. 494-5, by virtue of the relation of wife or otherwise;

That the defendant, David Fountain, individually, claims or may claim the lands above described or a portion thereof, designated as tract

494-5, or some interest therein, as owner or otherwise, and that the defendant Mrs. David Fountain, wife of David Fountain, if any, claims or may claim some interest in the lands above described or a portion thereof, designated as tract 494-5, by virtue of the relation of wife or otherwise;

(9) That the defendant, Northwestern Mortgage Security Company, is a corporation organized under the laws of the State of North Dakota, with its office and principal place of business at Fargo, North Dakota, and that it claims or may claim some interest as mortgagee or otherwise, in the lands above described designated as tract 494-5;

(10) That the defendant, Montana State Bank, Fallon, Montana, a banking corporation, is a corporation organized under the laws of the State of Montana, and it claims or may claim an interest in the lands above described or a portion thereof, designated as tracts 494-5 and 494-14, as mortgagee or otherwise;

That the defendant, W. Alf Brown is Superintendent of State Banks of the State of Montana, and that he claims or may claim as such officer, an interest in the lands above described as tracts 494-5 and 494-14 by virtue of a mortgage held on the above described lands or a portion thereof, by the Montana State Bank, Fallon, Montana, an insolvent bank, to whose assets plaintiff is informed and believes, he has succeeded; [15]

(11) That the defendant, Frederick J. Banister, claims or may claim the lands above designated as tract 494-6, as owner or otherwise;

And that the defendant, Mattie A. Banister, wife, if any, of Frederick J. Banister, claims or may claim an interest in the lands above described, designated as tract 494-6, by virtue of the relation of wife or otherwise;

(12) That the defendant, Martin Tjensvold, claims or may claim the lands above designated as tract 494-7 as owner or otherwise; and that the defendant, Mrs. Martin Tjensvold, wife of Martin Tjensvold, if any, claims or may claim an interest in the lands above designated as tract 494-7, by virtue of the relation of wife or otherwise;

(13) That the defendant, School District No. 10, a municipal corporation of Dawson County, Montana, claims or may claim an interest as owner or otherwise in one acre of land in the northeast corner of the NE $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 14, Township 13 North of Range 53 East of the Montana Meridian, in part of the lands above designated as tract number 494-8;

(14) That the defendants, Edna Yale, Allen W. Yale and Ruth Petterson, claim or may claim an interest in the lands above described and designated as tracts 494-8, 494-12, 1-27, 1-47, 1-53 and 511-3, as owners or otherwise;

And that the defendant, Mrs. Allen W. Yale, wife of Allen W. Yale, if any, claims or may claim an interest in the lands above described and designated as tracts 494-8, 494-12, 1-27, 1-53 and 511-3, by virtue of the relation of wife or otherwise;

(15) That the defendant, The Merchants National Bank of Glendive, a banking corporation, is

a corporation organized and existing under and by virtue of the laws of the State of Montana, and it claims or may claim an interest in the lands above described designated as tracts 494-8 and 511-1, as mortgagee or otherwise;

(16) That the defendant, Florence Jessie Louis, claims or may claim an interest in the lands described and designated as tracts 494-9, 1-47 and 1-53, as owner or otherwise; [16]

(17) That the defendant, Midland Coal and Lumber Company, a corporation, is a corporation organized under the laws of the State of Montana, with its office and principal place of business at Glendive, Montana, and that it claims or may claim an interest in the lands above described and designated as tract 494-10, as owner or otherwise;

(18) That the defendant, Mary Hagen, claims or may claim an interest in the lands above described and designated as tract 494-10, as owner or otherwise;

(19) That the defendant, John B. Weber, claims or may claim an interest in the lands above described and designated as tracts 494-11 and 494-13, or a portion thereof, as owner or otherwise;

And that the defendant, Margaret E. Weber, his wife, claims or may claim an interest in the lands above described and designated as tracts 494-11 and 494-13, or a portion thereof, by virtue of the relation of wife, or otherwise;

(20) That the defendant, Caroline Forquer, claims or may claim an interest in the lands above described and designated as tracts 494-11 and 494-13, or a portion thereof, as owner or otherwise;



And that the defendant, Bernard B. Forquer, her husband, claims or may claim some interest in the lands above described and designated tracts 494-11 and 494-13, or a portion thereof, as owner or otherwise;

(21) That the defendant, Charles G. Pearce, Trustee, claims or may claim an interest in the lands above described and designated as tract 494-11, or a portion thereof, and in tract 494-13, as owner, mortgagee, or otherwise;

(22) That the defendant, John Siegel, Sr., claims or may claim an interest in the lands or a portion thereof, described and designated as tract 494-12, as owner or otherwise;

(23) That the defendant, Alfred A. Peacock, claims or may claim an interest in the lands above described and designated as tract 494-13, as owner or otherwise;

And that the defendant, Mrs. Alfred A. Peacock, wife of Alfred A. Peacock, if any, claims or may claim an interest in the lands above described and designated as tract 494-13, by [17] virtue of the relation of wife or otherwise;

(24) That the defendant, Claud H. Young, claims or may claim an interest in the lands above described and designated, or a portion thereof, designated as tract 494-13, as owner or otherwise;

And that the defendant, Mrs. Claud H. Young, wife of Claud H. Young, if any, claims or may claim an interest in the lands above described and designated as tract 494-13, or a portion thereof, by virtue of the relation of wife, or otherwise;

(25) That the defendant, Peter E. Tjensvold, claims or may claim an interest in the lands above described designated as tract 494-14, as owner or otherwise;

And that the defendant, Lillian Tjensvold, his wife, if any, claims or may claim an interest in the lands above described and designated as tract 494-14, by virtue of the relation of wife or otherwise;

(26) That the defendant, Gabriel E. Tjensvold, claims or may claim an interest in the lands above described designated as tract 494-14, as owner or otherwise;

And that the defendant, Mrs. Gabriel E. Tjensvold, claims or may claim an interest in the lands above described, designated as tract 494-14, by virtue of the relation of wife, or otherwise;

(27) That the defendant, Sinclair Holding Company, a corporation, is a corporation organized under the laws of the State of Minnesota, with its office and principal place of business at Minneapolis, Minnesota, and that it claims or may claim an interest in the lands above described, or a portion thereof, as mortgagee or otherwise, designated as tract 494-14;

(28) That the defendant, Security Agency and Loan Corporation, is a corporation, as plaintiff is informed and believes, organized under the laws of the State of Illinois, with its office and principal place of business at Rockford, Illinois, and that it claims or may claim an interest in the lands above

described and designated as tract 494-14, as mortgagee or otherwise;

(29) That the defendant, Upper Glendive-Fallon Irrigation District is a public corporation organized and existing under [18] and by virtue of the laws of the State of Montana, with its office and principal place of business at Glendive, Montana, and that it claims or may claim some interest in the lands above described and designated as tracts 494-1, 494-2, 494-3, 494-4, 494-5, 494-6, 494-7, 494-8, 494-9, 494-10, 494-11, 494-12, 494-13, 494-14, 1-27, 1-47, 1-53, 511-1, 511-2, 511-3, 511-4, 511-5, 511-6, 511-7, and 1-12, other than as a right of way for ditches or easements of way for transportation of water excepted therefrom.

(30) That the defendant, Dawson County, Montana, is a body politic and corporate and as plaintiff is informed and believes, that it is the record owner and claims as the owner thereof, the tracts of land above described and designated as tracts 494-1, 494-2, 494-3, 494-4, 494-5, 494-6, 494-7, 494-8, 494-10, 494-9, 494-11, 494-12, 494-13 and 494-14, as owner of each thereof;

(31) That the defendant, W. C. Sloan, claims or may claim the lands above described and designated as tract 511-1, as owner or otherwise;

And that the defendant, Mrs. W. C. Sloan, wife of W. C. Sloan, if any, claims or may claim some interest in the lands above described and designated as tract 511-1, by virtue of the relation of wife or otherwise;

(32) That the defendant, Hester G. Johnson, claims or may claim an interest in the lands above described and designated as tract 511-2, as owner or otherwise;

(33) That the defendant, Elsie L. Clark, claims or may claim an interest in the lands above described and designated as tract 511-7, as owner or otherwise;

(34) That Charles A. Thurston died on or about the 14th day of January, 1943, in the County of Dawson, State of Montana. That he died testate and that his last will and testament was duly admitted to probate in the District Court of the Seventh Judicial District of the State of Montana, in and for the County of Dawson, on May 26th, 1943, and that Frank P. Abbott was appointed as the executor of his last will and testament and is now the duly qualified, acting [19] executor of the last will and testament of Charles A. Thurston, deceased, and that he as such executor claims or may claim some interest in the lands hereinabove described, designated as tract number 511-5.

That the defendant, Edith Austin, who affiant is informed and believes, is the sole and only heir at law of Charles A. Thurston, deceased, claims or may claim some interest in the lands above described and designated as tract number 511-5, and that the unknown heirs at law, if any, of Charles A. Thurston, deceased, claim or may claim some interest in the lands above described, designated as tract number 511-5.



That the defendant, Mary Olney Abbott, as devisee of Charles A. Thurston, deceased, claims or may claim an interest in the above described tract designated as tract Number 511-5, or otherwise;

That the defendants, Eleanor B. Doremus, Kenneth H. Barnard and Mary H. Barnard, as legatees of Charles A. Thurston, deceased, as plaintiff is informed and believes, claim or may claim an interest in the above described lands designated as tract number 511-5, or some part thereof;

That the defendant, Mrs. Kenneth H. Barnard, wife, if any, of Kenneth H. Barnard, claims or may claim some interest in the lands above described designated as tract 511-5, by virtue of the relation of wife or otherwise;

(35) That Robert Henderson died testate on or above the 25th day of April, 1934, in Dawson County, Montana; that his last will and testament was by an order duly given, had and made in the District Court of the Seventh Judicial District of the State of Montana, in and for the County of Dawson, duly admitted to probate May 23rd, 1934, and that Michael J. Hughes was appointed executor of his last will and testament and ever since has been and now is the duly qualified and acting Executor of the last will and testament of Robert Henderson, deceased, and of his estate, and is named as trustee of his estate as plaintiff is informed and believes, in the said last will and testament of Robert Henderson, deceased; that the defendant, Michael J. Hughes, as executor of the last will and testament and as trustee of the estate of

Robert Henderson, deceased, claims an [20] interest in the lands above described and designated as tract 1-12, as such executor and that in proceedings heretofore had, an order has been made and entered in the District Court of the Seventh Judicial District of the State of Montana, in and for the County of Dawson, authorizing the said Michael J. Hughes, as such executor to sell the lands described and designated as tract 1-12, to the plaintiff herein.

(36) That the defendants, Mabel A. Guy, Bud Guy, Christina Henderson, Christina Schepens, Mrs. Helen Johnson, Mrs. Lottie Jenkins, Robert A. Henderson, Mrs. Blanche Henry, Mrs. Aurelia Henry, Mrs. Addie Bradason, Edward Henderson, Walter Leonard Henderson, Margaret Valletta Henderson and James Walter Henderson, claim or may claim an interest in the lands above described and designated as tract 1-12, as heirs of Robert Henderson, deceased, or as devisees under the last will and testament of Robert Henderson, deceased, or otherwise;

(37) That the defendant, The Glendive Land and Irrigation Company of Glendive, a corporation, is a corporation organized and existing under and by virtue of the laws of the State of Montana, with its office and principal place of business at Glendive, Montana, and that it claims or may claim an interest in the lands above described and designated as tracts 511-4 and 511-6, as owners or otherwise;

(38) That the defendant, Prairie County, Montana, is a body politic and corporate, and as plain-

tiff is informed and believes, is the record owner of the lands described and designated as tracts 511-1, 511-2, 511-3, 511-5, 511-6, and 511-7, and claims each as owner thereof, and that it claims or may claim the lands above described and designated as tract 511-4 as owner or otherwise;

(39) That the defendants, Mary Hagen; E. B. Clark; Michael Dahlke; Farmers State Bank, a corporation; O. M. Aarseth; Alexander Seifert; R. S. Schmid; Conrad Zankle; Theo J. Hanson; J. A. Pinkava; George Coakley; L. C. Churchill; Perry Harrison; Underwood & Co., a corporation; Henry Martin; Eva I. Orr; Rena A. Eisley, Administratrix of the estate of R. C. Eisley, deceased; Paul E. Martin; Morrison & Company, a corporation; Isaac A. Milton and Mrs. Isaac A. Milton, individually and as husband and wife; Albert Anderson; N. M. Coursolle; Harry F. Johnson, Administrator of the Estate of Everett C. Johnson, deceased; Maxine Pitsch; Erick G. Eklund; Ardell W. Hansen, Administratrix of the Estate of O. F. Hansen, deceased; Ainsworth R. Hansen, Mary A. Hansen, Evelyn L. Burgess, Violette L. Davis and Lyndon E. Hansen, individually and as heirs of O. F. Hansen, deceased; Russell F. Olson; F. Leon Ottawa; C. C. Wiemals; Ruth A. McKinlay; Oscar J. Olm; Henry Anderson; C. M. Anderson; Clara Anderson Aubey; Latsch & Son Company, a corporation First National Bank & Trust Company of Minneapolis, a corporation; Esther L. Kemp; Minnie R. Evans; Victoria M. McAlmon; I. Hesdorffer; and Dawson County, Montana, a body

politic and corporate, claim or may claim an interest as lien claimants of the holders of bonds issued by the Upper Glendive Fallon Irrigation District named herein as a defendant or otherwise, in the lands above described or portions thereof, save and except tract number 1-12.

## VII.

Plaintiff further alleges that the defendants herein named are the only persons who have or appear to have any interest of record in the lands above described or any part thereof, and according to the best knowledge, information and belief of the plaintiff, after due and diligent search, they are the only persons claiming an interest in the lands above described as owners or otherwise, or any part thereof in the lands or any interest therein; but notwithstanding such statement, all persons and corporations unknown, who may claim any interest in the lands described herein or any thereof, are made parties to this action or proceeding generally to the end that all right, title, interest and estate whatsoever it may be, insofar as the same may relate to or in anywise affect the acquisition of the said lands and all thereof, may be divested out of them and each of them, and vested in the plaintiff, The United States of America.

## VIII.

That the plaintiff, in pursuance of the Act of February 25, 1931, [22] (48 Stat. 1421) (40 U.S.C.A. 258a) and Acts supplementary and amendatory



thereof, has filed a Declaration of Taking, and deposited in the registry of the Court the estimated value of the lands and the compensation payable to the owners thereof, and that plaintiff requires or may require the immediate possession of the said lands and premises for the public use herein alleged and set forth.

### IX.

That the property hereinabove described has not heretofore been appropriated to or for any public use; that the use to which said lands are to be appropriated for the United States, are the uses authorized by law and that the taking is necessary to such use or uses as herein alleged.

Wherefore, the premises considered and to the end that the fee simple title to the lands herein described and sought to be condemned and acquired by the United States of America, in accordance with the several statutes and Acts of Congress in such cases made and provided, free and discharged from all liens, encumbrances, servitudes, charges, restrictions and covenants whatsoever, except subject to water rights or easements that may have been acquired for the public highways, the Plaintiff prays this Honorable Court:

1. To fix a day of hearing and notify and summon owners and persons interested in the lands, parcels, lots and portions constituting same, described in this complaint and that they may appear and show cause if any they have why the lands

should not be condemned as prayed for in plaintiff's complaint and to answer plaintiff's complaint on or before said day;

2. To appoint three qualified, competent and disinterested persons as commissioners to ascertain, appraise and determine the just compensation for the taking of the said property including all the buildings and improvements if any thereof, and to fix a time for their first meeting and prescribe their compensation;

3. To take such action, enter such orders, decrees and judgments as may be necessary or proper to effect the objects to which the aforesaid Acts of Congress, insofar as they relate to the acquisition of the lands or real estate require, and to [23] cause the title to said lands described in this complaint required for the said public use herein alleged, free from all liens, encumbrances, charges, restrictions, servitudes, claims and covenants whatsoever, to vest in the United States of America, in the event that upon confirmation of the report of the commissioners or the verdict of the jury herein, the Secretary of Agriculture (if in his judgment the value fixed by the Commissioners or the jury is reasonable) shall cause payment to be made out of the money appropriated by Congress according to the award of the Commissioners and/or the judgment of this Honorable Court, into the registry of the Court.

4. To grant such other and further relief as the nature of the case may require.

THE UNITED STATES OF  
AMERICA,

By JOHN B. TANSIL,

U. S. Attorney for the Dis-  
trict of Montana, Billings,  
Montana,

Per C. W. BUNTIN,

Special Assistant to the U. S.  
Attorney,

Attorneys for Plaintiff

Buffalo Rapids Project.

[Endorsed]: Filed March 27, 1944.

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Thereafter, on May 13, 1944, an Answer, Counter-claim and Cross-Claim was duly filed herein, in the words and figures as follows, to-wit: [25]

[Title of District Court and Cause.]

ANSWER, COUNTER CLAIM AND  
CROSS CLAIM

Come Now the defendants, Mary Hagen, E. B. Clark and Minnie R. Evans on their own behalf and on behalf of all other bond holders or warrant holders of the Upper Glendive-Fallon Irrigation District, named as defendants in the summons which

was dated March 27, 1944, and issued pursuant to the second amended complaint filed in the Clerk of the above-entitled Court, and show to the Court:

1. The said Mary Hagen, E. B. Clark and Minnie R. Evans, and all of the defendants named in the above-entitled action who are the owners of outstanding and unpaid bonds and warrants of the said Upper Glendive-Fallon Irrigation District, and who have not otherwise specially appeared in this action, have a community of interest; and the relief sought by the plaintiff in the above-entitled action is asserted against them jointly and severally; and concerns the right to relief in respect of, and rises out of the same transaction, occurrence, and series of transactions and occurrences, and the questions of law and facts involved and that will arise in this action are common to all of the said defendants and owners of bonds and warrants of said Upper Glendive-Fallon Irrigation District who have the same status and relation to said district as that occupied by the said Mary Hagen, [26] E. B. Clark and Minnie R. Evans. And this Answer and defense and counter claim and cross claim is made on behalf of the said Mary Hagen, E. B. Clark and Minnie R. Evans and on behalf of all of said defendants similarly situated and having common interest, pursuant to rules 12, 13 and 20 of the Rules of Civil Procedure.

2. These defendants admit the jurisdiction of the above-entitled district court.



3. These defendants admit that the lands described in the second amended complaint and in the said summons in the above-entitled action are required for the public use, as set forth in said second amended complaint and that condemnation thereof for the public use is necessary in order to vest the title of said lands in the United States of America. But these defendants allege that when just compensation for the taking of said property be determined that payment thereof should be made to the said Mary Hagen, E. B. Clark and Minnie R. Evans and all of the defendants similarly situated, to the extent of and in accordance with their respective interests therein.

4. As an affirmative defense and in the nature of a counter claim against the compensation deposited by the plaintiff, or ascertained to be due and as a cross claim against any of the defendants having adverse claims or interests, these defendants further allege:

a. That pursuant to a petition duly filed in the District Court of the Seventh Judicial District of the State of Montana in and for Dawson County, the Upper Glendive-Fallon Irrigation District, an irrigation district, was duly organized under the laws of the State of Montana and on December 20, 1920, an order was duly made and entered in said district court [27] of the State of Montana pursuant to said petition organizing and creating the said irrigation district, which duly established the said district and fixed and described the lands included

therein, and said irrigation district thereby became a public corporation, and all of the lands included in said district became liable to all of the debts, taxes and assessments thereof. That said order duly appointed commissioners for each division of said district; Division 1 being as to lands in said district located in Prairie County, State of Montana, and Divisions 2 and 3 covering lands located in Dawson County, State of Montana. That the commissioners appointed for said irrigation district duly qualified as provided by law.

b. That for the purpose of providing the necessary funds for the construction of a system of irrigation works for said district, in accordance with the plan of reclamation of said district approved by the Public Service Commission of the State of Montana, and as approved by resolution duly adopted by the Board of Commissioners and Directors of said District and a petition of a majority number and acreage of the holders of title or evidence of title to the lands included within said district, the said commissioners and directors of said irrigation district authorized and directed the issue of negotiable coupon bonds of the said district for the aggregate sum of \$150,000, being an issue of 300 bonds of \$500.00 each, numbered consecutively from 1 to 300, inclusive, which bonds were redeemable at the option of the said district on the first day of January of any year after 20 years from the date thereof.

That after the adoption of the said resolution of the said Board of Commissioners of said [28] irrigation district filed a petition in the said district Court of the Seventh Judicial District of the State of Montana in and for the County of Dawson to determine the validity of the proceedings had relative to the issuance of said bonds and to secure a levy of a special tax and assessment to make payment thereof and due notice of said petition and the hearing thereon was duly given as provided by law and after due hearing the said district court found and determined that the provisions and requirements of law regarding the establishment and organization of said district and the issuance of said bonds had been complied with and that due notice of said hearing had been duly given for the time and in the manner prescribed by law, and on December 2, 1922, an order was duly made and entered in said proceedings by the said District Court of Dawson County, which ratified, approved and confirmed said proceedings and ratified, approved and confirmed said bonds and the issuance thereof and the special tax and assessments required for the payment thereof, and said order authorized and directed the said Board of Commissioners of said District to issue the said bonds of said District accordingly and no appeal was taken or objection filed from the order creating and organizing said irrigation district or from the order confirming the issuance of said bonds and directing special taxes for the payment thereof. That all acts, conditions and things required or authorized by the constitution and laws of the State

of Montana to be done and to exist precedent to and in the issuance of said bonds in order to constitute same valid and binding obligations of said irrigation district and to provide for the annual levy and collections of a special tax upon all of the real estate within said irrigation district to meet the principal and interest of said bonds as they came due, were had and done and duly performed.

c. That relying upon said proceedings and the orders of said court, the commissioners of said irrigation [29] district duly issued 163 bonds for the payment of \$500.00 each or the aggregate sum of \$81,500.00, pursuant to the laws of the State of Montana, all bearing date of January 1, 1923, and all redeemable at the option of the said district on the first day of January of any year after 20 years from the date thereof, and bearing interest from their said date until paid at the rate of 6 per cent per annum, payable semi-annually on the first days of January and July of each year, and the interest and principal of said bonds were payable in gold coin of the United States of America or its equivalent, at the office of the County Treasurer of Dawson County at Glendive, Montana. That all of said bonds were signed by the President and attested by the Secretary of the Board of Commissioners of said irrigation district and under the Corporate seal thereof, and attached to each bond were interest coupons of \$15.00 each which were executed by the engraved or lithographed facsimile signatures of said president and secretary. That all of the bonds



and interest coupons were negotiable instruments and were duly issued, negotiated and sold by and under the direction of the Board of Commissioners of said district in accordance with the laws of the State of Montana.

That the secretary of said Board of Commissioners of said district kept a record of the bonds sold, their date, number, amount and maturity, to whom sold, the rate of interest and the place of payment. And the Board of Public Service Commission of the State of Montana attached to each bond a certificate that the said bond was issued in accordance with the laws of the State of Montana and each of said bonds was also duly registered in the office of the County Treasurer of Dawson County, Montana, on June 21, 1923. That said bonds were all issued, negotiated and sold for cash and the bonds were delivered to the County Treasurer of Dawson County, [30] Montana, who delivered the same to the purchasers upon receipt of the purchase price therefor, and the said County Treasurer received the proceeds of the sale of said bonds and placed same to the credit of said district and all of said proceeds were expended for the purposes for which said bonds were issued.

That each of said bonds and the interest thereon were payable from the collection of a special tax or assessment against all the lands in said irrigation district and the said bonds and the assessments levied by said district were a first and prior lien on all of the said real estate within said district and

all of the property of said district became liable for the payment of said bonds and the interest thereon.

d. Pursuant to law and in accordance with their duty, the Commissioners of said irrigation district did provide for the annual levy and collection of a special tax and assessment upon all of the lands included in the said district, which would have been sufficient, if said levy and collection had been continued, to pay the said bonds and interest. And copy of the resolution of the said Commissioners of said irrigation district for said levy was filed with the Clerk of the Board of County Commissioners of Dawson County and Prairie County, State of Montana, in which the lands in said irrigation district were situated. And it was the duty of the commissioners of said irrigation district and the duty of the County Commissioners of said Dawson County and Prairie County, Montana, to provide and make an annual levy of taxes and assessments against the lands in the said irrigation district for the payment of the principal and interest of said bonds.

e. That all of the lands described in the second amended complaint herein and in the summons in this action, were within the said irrigation district and subject to the liens of the said bonds issued by said district and the assessments thereon. [31]

That the lien of said bonds and said assessments is a general and common lien upon all of said lands in said district and described in the second amended

complaint herein and there is no way of segregating the lien as to any particular land and the said bonds are not a lien on any particular land but on all the lands in said irrigation district. That the commissioners of said irrigation district did not make or provide all levies against the lands of said district as required by law and the Board of County Commissioners of Dawson County and Prairie County, Montana, did not make all levies or assessments against the lands of said district as required by law.

f. That a list of the bonds sold, their number, names of owners and present address, so far as known, is as shown by Exhibit A attached hereto and made a part hereof, which bonds with interest at 6% per annum from Jan. 1, 1927, are due, owing and unpaid.

g. That the said Mary Hagen, E. B. Clark, jointly own bonds numbered 1 to 14, inclusive; 58 to 68, inclusive; and 71 to 80, inclusive; being \$500.00 each and of the total amount of \$17,500.00. And the defendant Minnie R. Evans owns bonds numbered 161 to 164, inclusive, or 4 bonds of \$500.00 each, or a total of \$2000.00. That the interest due and payable on said bonds have been paid to January 1, 1927, and said bonds with interest from Jan. 1, 1927, are due, owing and unpaid by defendant irrigation district of said counties.

h. That subsequent to the issuance of said bonds the defendants, Dawson County, Montana, and Prairie County, Montana, took proceedings purporting to acquire title to nearly all of the lands

included in said irrigation district excepting as to the lands hereinafter stated, and purported to have tax deeds issued on said lands to said counties and now claim title to the compensation paid or to be paid by the plaintiff herein on account of the condemnation of said lands. That the claims of the said counties to said lands and to compensation are subject to, inferior, and subsequent to said bonds and the liens thereof and the rights of these defendants. That the said [32] Dawson County and Prairie County, Montana, were and are obligated to collect against the said lands within the said district, annual assessments sufficient to pay the said bonds and the said counties occupy the status of trustees in relation to the said bonds and in relation to the owners of said bonds, and as such trustees they are prevented by law from taking a position adverse to or antagonistic to said bonds or the rights of the owners thereof.

i. That the said Dawson County and Prairie County have collected monies on levies and assessments made against said lands, which they now hold and which they have not paid or accounted for to these defendants and to the holders and owners of said bonds, and it is the duty of said counties to account to these defendants and the owners and holders of said bonds for all monies received on account of said land or on account of said assessments for the purpose of paying said bonds. And the said defendant counties have received monies from said lands on account of taxes and assessments and on account of leases made on said lands and



rents received for which no accounting has been made with these defendants or the owners and holders of said bonds.

j. That these defendants have no knowledge of the exact amount of monies received by the defendant counties, as aforesaid, and have had no accounting with the said defendant counties and it is the duty of the defendant counties to now render and give to these defendants and to the owners and holders of said bonds, a full and complete account of all taxes and assessments against said lands and of all monies received on account of said lands by the said defendant counties as trustees for the said bonds and owners thereof.

k. That these defendants and the owners and holders of said bonds have the first and prior right and claim [33] to said lands and to the compensation to be made and paid by the plaintiff, the United States of America, on the condemnation of said lands and all compensation paid by the plaintiff should be first applied upon the bonds of these defendants and the owners and holders of said bonds, in accordance with their respective interest and rights, prior to any payment to the other defendants to this action, and particularly prior to any payment to Dawson County or Prairie County.

l. That the defendants Edna Yale, Allen W. Yale and Ruby Yale, his wife, and Ruth Petterson and Hans Petterson, her husband, claim title to and the right to compensation for the lands described in the second amended complaint and the summons, as

tract No. 1-27 and the defendant, The Scottish American Mortgage Company, Limited, claim title to and the right to compensation for the lands described in the second amended complaint and the summons as tracts No. 1-47 and 1-53. But the claims of the said defendants, and each of them, are subject to, inferior and subsequent to the lien, rights and claims of these defendants and the owners and holders of said bonds in accordance with their respective interest and the compensation paid in this action is due and payable to these defendants and the owners and holders of said bonds prior to the claims of the said Edna Yale, Allen W. Yale, Ruby Yale, Ruth Petterson and Hans Petterson and The Scottish American Mortgage Company, Limited.

Wherefore, the said Mary Hagen, E. B. Clark and Minnie R. Evans petition and pray to the court as follows:

That an accounting be had by and on behalf of said defendants and on behalf of all other bond holders entitled to the same relief and having a common interest, with the defendants Dawson County and Prairie County, State of Montana, in order [34] to determine the rights of said defendants and the amount due and owing from said defendant counties and that judgment be entered accordingly.

And that the said Mary Hagen, E. B. Clark and Minnie R. Evans and other defendants who are owners and holders of said bonds and similarly

situated and having like rights and common interest, be adjudged and entitled to the prior payment of the said compensation to be paid by the plaintiff herein, and that the court hear and fix the rights of all the parties hereto in and to the said monies so paid, and that the court fix and determine all of the rights of the defendants herein as between themselves, and that judgment be entered accordingly.

And that the court direct such further notice as may be required and that a full settlement of the matters involved herein be made as may be just and equitable.

And that the said Mary Hagen, E. B. Clark and Minnie R. Evans be allowed their costs and expenses and that their attorneys be allowed such reasonable attorneys fees as may be just and equitable, to be paid out of the funds subject to the jurisdiction of the court.

DESMOND J. O'NEIL,  
Glendive, Montana.

P. F. LEONARD,  
Miles City, Montana.  
Attorneys for Said  
Defendants. [35]

EXHIBIT A

No.	Owners and Addresses	Amounts
1-14	Mary Hagen, Glendive, Mont., and E. B. Clark, Carlsbad, Calif.....	\$ 7,000.00
15-16	Michael Dahlke, Hudson, Wis.....	1,000.00
17-18	Farmers State Bank, Stephen, Minn.....	1,000.00
19-20	O. M. Aarseth, Echo, Minn.....	1,000.00
21	Alexander Seifert, Springfield, Minn.....	500.00
22	R. S. Schmid, Eden Valley, Minn.....	500.00
23-24	Conrad Zankle, Springfield, Minn.....	1,000.00
25	Theo. J. Hanson, Britton, S. D.....	500.00
26	J. A. Pinkava, Austin, Minn.....	500.00
27	George Coakley, Savage, Minn.....	500.00
28-29	L. C. Churchill, Windom, Minn.....	1,000.00
30	Perry Harrison, Excelsior, Minn.....	500.00
31-32	Underwood & Co., 56 Pine St., New York City, N. Y. ....	1,000.00
33-35	Henry Martin, Tupper Lake, N. Y.....	1,500.00
36-45	Mrs. Eva I. Orr, 905 W. Franklin Ave., Minneapolis, Minn. ....	5,000.00
46-49	Rena A. Eisley, Admr., Sheboygan, Mich.	2,000.00
50	Paul E. Martin, Tupper Lake, N. Y.....	500.00
51-53	Morrison & Co., 250 E. 6th St., Minneapolis, Minn. ....	1,500.00
54	Mr. or Mrs. Isaac A. Milton, Long Beach, Calif. ....	500.00
55-57	Albert Anderson, Sup. Ct., Helena, Mont., and N. M. Coursolle, Minneapolis, Minn.....	1,500.00
58-68	Mary Hagan and E. B. Clark, supra.....	5,500.00
69-70	Paul E. Martin, supra.....	1,000.00
71-80	Mary Hagen and E. B. Clark, supra.....	5,000.00
81-87	Morrison & Co., Minneapolis, Minn.....	3,500.00
88-89	I. Hesdorffer, U. of M., Missoula, Mont.....	1,000.00
90	H. F. Johnson, Admr. Estate E. C. Johnson, Dec., Winona, Minn.....	500.00
91	Maxine Fitch (Fitsch), 303 Wisconsin St., Chicago, Ill. ....	500.00



No.	Owners and Addresses	Amounts
92	Erick G. Eklund, Fooston, Minn.....	\$ 500.00
93	Ardell W. Hansen, Admr. Estate O. F. Hansen, Dec., Heirs Ainsworth R. Hansen, Glendale, Calif., Violette L. Davis, Farmington, Minn., and Lyndon E. Hansen, 1217 4th St., Minneapolis, Minn.....	500.00
94	Morrison & Co.....	500.00
95-100	I. Hedorffer, supra.....	3,000.00
101	Russell F. Olson, Victor, S. D.....	500.00
102	F. Leon Ottawa, Isle, Minn.....	500.00
103-106	C. C. Wiemals, Hazelton, N. D.....	2,000.00
107	Morrison & Co., supra.....	500.00
108-109	Ruth A. McKinlay, Midford, Minn.....	1,000.00
110-111	Oscar J. Olm, 900 W. 48th St., Minneapolis, Minn. ....	1,000.00
114-115	Clara J. Anderson Aubey, St. Louis Park, Minn. ....	1,000.00
118-121	Henry Anderson, Rush City, Minn.....	2,000.00
122-125	C. M. Anderson, Conde, S. D.....	2,000.00
126-127	Clara L. Anderson Aubey, supra.....	1,000.00
128-137	Latsch & Son Co., Winona, Minn.....	5,000.00
138-141	1st Natl. Bank & Tr. Co., Trustee, Minneapolis, Minn. ....	2,000.00
142-147	Esther L. Kemp, Lake City, Minn.....	3,000.00
148-149	Latsch & Son Co., supra.....	1,000.00
150-152	Ruth A. McKinlay, Medford, Minn.....	1,500.00
155-156; 172-173; 191-192; 210-211,	Latsch & Son Co.	4,000.00
161-164	Minnie R. Evans, Rochester, Minn.....	2,000.00
231-232	Ruth A. McKinlay, supra.....	1,000.00
300	Victoria M. McAlmon, 2717 Waverly Drive, Los Angeles, Calif.....	500.00
		<hr/>
		\$81,500.00

[Endorsed]: Filed May 13, 1944. [36]

Thereafter, on May 20, 1944, an Answer of Dawson County and Petition for Distribution was duly filed herein, in the words and figures following, to-wit: [37]

[Title of District Court and Cause.]

## ANSWER AND PETITION FOR DISTRIBUTION

Comes now Dawson County, Montana, a body politic and corporate, and answers plaintiff's complaint herein.

Answering defendant admits the allegations of plaintiff's complaint and for further answer alleges:

### I.

That Dawson County, Montana, is a body politic and corporate, created under the laws of the State of Montana, and as such and under date of January 12, 1942, executed an offer in writing to sell to the United States of America for the sum of Twenty-three Thousand Five Hundred Twenty-six Dollars (\$23,526.00) the lands described in plaintiff's complaint as tracts numbered 494-1 to 494-14, inclusive; that said offer to sell was made pursuant to certain proceedings had and done by the Board of County Commissioners of said Dawson County, Montana, all of which were in accord with the statutory provisions and laws of the State of Montana particularly relating to the sale and disposal of all

lands acquired by Dawson County, Montana, under tax deed proceedings; that a true and correct transcript of said proceedings had and done by the said Dawson County, Montana, acting by and through its Board of County Commissioners, is hereto attached, hereof made a part and by reference marked "Answering Defendant's Exhibit A." [38].

## II.

That the lands involved in said tax deed proceedings, sold to the United States and involved in this action, upon which tax deed were obtained by Dawson County, Montana, including taxes levied by the State of Montana, Dawson County, Montana, and school districts, and taxes levied by Upper Glendive-Fallon Irrigation District, a public corporation, together with the purchase price of each tract as appraised and valued by the Board of County Commissioners of Dawson County, Montana, and agents of the Government of the United States, being officers, attorneys and employees of the Farm Security Administration of the United States of America, are as follows, to-wit:

### Tract 494-1

South Half (S1½) of Section One (1) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana. Value fixed by agreement between Dawson County, Montana, and United States of America.....	\$3,316.10
General Taxes.....	\$ 581.57
Interest on General Taxes.....	159.95
Irrigation Taxes.....	2,216.96

Tract 494-2

South Half of the Southwest Quarter ( $S\frac{1}{2}$ - $SW\frac{1}{4}$ ) of Section Ten (10) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana. Value fixed by agreement between Dawson County, Montana, and the United States of America..... \$ 684.40

General Taxes.....	\$ 154.80
Interest on General Taxes.....	40.55
Irrigation Taxes.....	704.00

Tract 494-3

South Half of the Southeast Quarter ( $S\frac{1}{2}$ - $SE\frac{1}{4}$ ) of Section Ten (10) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana. Value fixed by agreement between Dawson County, Montana, and the United States of America..... \$ 734.00

General Taxes.....	\$ 203.52
Interest on General Taxes.....	55.84
Irrigation Taxes.....	1,182.43

Tract 494-4

South Half ( $S\frac{1}{2}$ ) of Section Eleven (11), Lots Two (2) and Three (3), Northwest Quarter of the Northwest Quarter ( $NW\frac{1}{4}NW\frac{1}{4}$ ) of Section Thirteen, all in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana. Value fixed by agreement between Dawson County, Montana, and the United States of America..... \$5,587.13

General Taxes.....	\$ 998.81
Interest on General Taxes.....	275.13
Irrigation Taxes.....	8,179.14

Tract 494-5

Northwest Quarter ( $NW\frac{1}{4}$ ), West Half of the Northeast Quarter ( $W\frac{1}{2}NE\frac{1}{4}$ ) of Section Twelve (12) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana. Value fixed by agreement between Dawson County,



*Dawson County, Montana vs.*

Montana, and the United States of America....	\$1,920.00
General Taxes.....	\$ 605.54
Interest on General Taxes.....	166.33
Irrigation Taxes.....	4,133.91

## Tract 494-6

Southwest Quarter (SW $\frac{1}{4}$ ) of Section Twelve (12) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Meridian, Montana. Value fixed by agreement between Dawson County, Montana, and the United States of America.....	\$1,280.00
General Taxes.....	\$ 448.17
Interest on General Taxes.....	123.31
Irrigation Taxes.....	3,253.25

## Tract 494-7

Lots One (1), Two (2), Three (3) and Four (4) of Section Twelve (12) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana. Value fixed by agreement between Dawson County, Montana, and the United States of America .....	\$ 275.08
General Taxes .....	\$ 153.30
Interest on General Taxes.....	42.04
Irrigation Taxes .....	1,257.95

## Tract 494-8

Lots One (1) and Two (2), the North Half of the Southwest Quarter (N $\frac{1}{2}$ SW $\frac{1}{4}$ ) of Section Fourteen (14) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana. Value fixed by agreement between Dawson County, Montana, and the United States of America	\$ 680.50
General Taxes.....	\$ 695.58
Interest on General Taxes.....	194.73
Irrigation Taxes.....	3,124.78

## Tract 494-9

Southwest Quarter of the Northeast Quarter (SW $\frac{1}{4}$ NE $\frac{1}{4}$ ), and Southeast Quarter of the Northeast Quarter (SE $\frac{1}{4}$ NE $\frac{1}{4}$ ), Northwest Quarter of the Northeast Quarter (NW $\frac{1}{4}$ -

NE $\frac{1}{4}$ ) and Lot Three (3) of Section Fourteen (14) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana. Value fixed by agreement between Dawson County, Montana, and the United States of America..... \$ 993.60

General Taxes.....	\$ 625.18
Interest on General Taxes.....	173.74
Irrigation Taxes.....	3,844.70

Tract 494-10

Northwest Quarter (NW $\frac{1}{4}$ ) of Section Fourteen (14) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana. Value fixed by agreement between Dawson County, Montana, and the United States of America..... \$ 320.00

General Taxes.....	\$ 260.99
Interest on General Taxes.....	72.78
Irrigation Taxes.....	2,793.82

Tract 494-11

All of Section Fifteen (15) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana. Value fixed by agreement between Dawson County, Montana, and the United States of America ..... \$ 995.00

General Taxes .....	\$2,348.94
Interest on General Taxes.....	747.50
Irrigation Taxes .....	2,211.32

Tract 494-12

Southwest Quarter (SW $\frac{1}{4}$ ), that portion of the Southeast Quarter of the Northwest Quarter (SE $\frac{1}{4}$ NW $\frac{1}{4}$ ) lying southeast of U. S. Highway No. 10 and more particularly described as follows: Beginning at the southeast corner of the SE $\frac{1}{4}$ NW $\frac{1}{4}$ , thence west along the south line of said SE $\frac{1}{4}$ NW $\frac{1}{4}$ , a distance of 1320 feet, thence north along the west line of said SE $\frac{1}{4}$ NW $\frac{1}{4}$  a distance of 931.5 feet to the south line of U. S. Highway No. 10, thence

north  $67^{\circ}14'$  east along the south line of said highway a distance of 919.9 feet to its intersection with the north line of said  $SE\frac{1}{4}NW\frac{1}{4}$ , thence east along the north line of said  $SE\frac{1}{4}NW\frac{1}{4}$  a distance of 438.5 feet, thence south along the east line of said  $SE\frac{1}{4}NW\frac{1}{4}$  a distance of 1320 feet to the point of beginning, containing 35.85 acres, more or less, all in Section Sixteen (16), Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana. Value fixed by agreement between Dawson County, Montana, and the United States of America..... \$2,242.65

General Taxes.....	\$ 533.33
Interest on General Taxes.....	133.20
Irrigation Taxes.....	3,767.29

#### Tract 494-13

Lots One (1), Two (2), Three (3), Four (4), Northwest Quarter of the Northeast Quarter ( $NW\frac{1}{4}NE\frac{1}{4}$ ), North Half of the Northwest Quarter ( $N\frac{1}{2}NW\frac{1}{4}$ ), Southwest Quarter of the Northwest Quarter ( $SW\frac{1}{4}NW\frac{1}{4}$ ) of Section Twenty-two (22) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana. Value fixed by agreement between Dawson County, Montana, and the United States of America ..... \$ 606.90

General Taxes.....	\$2,552.94
Interest on General Taxes.....	702.14
Irrigation Taxes.....	2,432.11

#### Tract 494-14

Lots One (1), Two (2), Three (3), Four (4), Five (5), Six (6), Seven (7), Eight (8), Eleven (11), Twelve (12), Thirteen (13), Southeast Quarter of the Northwest Quarter ( $SE\frac{1}{4}NW\frac{1}{4}$ ), Northeast Quarter of the Southwest Quarter ( $NE\frac{1}{4}SW\frac{1}{4}$ ) of Section Six (6), in Township Thirteen (13) North of Range Fifty-four (54) East of the Montana Principal Meridian, Montana. Value fixed by

agreement between Dawson County, Montana, and the United States of America.....	\$3,890.64
General Taxes.....	\$ 715.58
Interest on General Taxes.....	194.33
Irrigation Taxes.....	2,561.32

### III.

That this answering defendant is informed and believes that a [41] Declaration of Taking has been filed in the above-entitled action and the purchase price for which the said lands were sold by Dawson County, Montana, to the United States of America, in the amount of Twenty-three Thousand Five Hundred Twenty-six Dollars (\$23,526.00), was deposited in the registry of this Court, and that by virtue of filing said Declaration of Taking all right, title, interest and claim upon the filing thereof to the lands above described, vested in the United States of America. That no person or persons whomsoever, other than answering defendant herein is entitled to distribution of the compensation deposited in the registry of the Court for said lands other than your petitioner, Dawson County, Montana, and that no other person or persons whomsoever had any right, title, interest or claim to the real property condemned by the United States of America and hereinbefore described in the preceding paragraph hereof, other than answering defendant, Dawson County, Montana, and that said lands are free and clear of all encumbrances whatsoever and that there are no outstanding taxes or delinquent taxes against the said lands by reason of the acquiring of title thereto by defendant Dawson County, Montana, a sub-division of the State of Montana, and that this answering defendant is entitled to immediate distri-



bution of the compensation deposited in the registry of this Court for the lands above described and the whole thereof by reason of said sale of said real property by Dawson County, Montana, to the United States of America, as hereinbefore set forth, and by reason of the Declaration of Taking entered in the above-entitled action; and further, answering defendant consents that the Court may enter all judgments or orders that may be required for divesting the answering defendant herein of all right, title, interest and claim in and to the lands above described, and to vest all right, title, interest and claim of answering defendant to the lands herein described in the United States of America.

That in order to complete said sale of said lands to the United States of America pursuant to action previously taken by the Board of County Commissioners of Dawson County, Montana, and on May 4, 1943, a resolution was duly made and entered by the Board of County Commissioners of Dawson County, Montana, a body politic and corporate, and passed by a unanimous [42] vote of the members of said Board at a regular meeting thereof held on said date, authorizing the Chairman of the Board of County Commissioners and the Clerk of Dawson County, Montana, to sign and execute any and all conveyances of said real property, vesting title thereto in the United States of America, upon payment of the consideration therefor in the sum of \$23,526.00, and to take any and all action necessary to complete said sale and to secure payment of the consideration for the said lands by answer and petition in the above-entitled action, which is hereinabove set forth

Wherefore, answering defendant prays that an order be made and entered distributing the compensation deposited in the registry of this Court to answering defendant, Dawson County, Montana, and for such other and further order as to the Court may seem meet in the premises.

E. W. POPHAM,

D. C. WARREN,

Attorneys for Defendant,

Dawson County, Montana.

ANSWERING DEFENDANT'S EXHIBIT A

Office of County Clerk and Recorder

State of Montana,

County of Dawson—ss.

I, L. T. Elliot, County Clerk of Dawson County, State of Montana, hereby certify that the following documents, viz:

1. Appraisal and order of Sale
2. Publication
3. Posting
4. Sale
5. Option to Government
6. Renewal of Option

are true and correct copies of originals filed and recorded in my office.

In Witness Whereof, I have hereunto set my hand and seal of the County this 12th day of May  
A. D. 1944.

[Seal]

L. T. ELLIOT,

Clerk and Recorder.

## Special Session

Office of County Commissioners, Glendive,  
Dawson County, Montana

March 23, 1940

Commissioners met at 10 o'clock a.m., in extra session pursuant to resolution and posted notice with all members answering the roll call.

The Commissioners now proceeded to appraise certain tracts of land acquired through tax deed procedure, after which the following resolution was passed without dissent.

## Resolution

Resolved that the board will on May 4, 1940, beginning at 10 o'clock a.m., of said day at the front door of the court house in Glendive, Montana offer for sale at public auction to the highest bidder all the right, title, interest, estate, lien, claim and demand of the State of Montana, County of Dawson, in and to the following described real property and the board appraised, determined and fixed the fair market value of said property at the amount set after the description.

Lots 1, 2, 3, 4, 5, 6, 7, 8, 11, 12 and 13, SE $\frac{1}{4}$ NW $\frac{1}{4}$ , NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Sec. 6-13-54.....	\$3,600.00
SE $\frac{1}{2}$ of Sec. 1-13-53.....	3,600.00
S $\frac{1}{2}$ S $\frac{1}{2}$ of Sec. 10-13-53.....	1,300.00
S $\frac{1}{2}$ of Sec. 11-13-53.....	2,550.00
Lots 1, 2, 3, 4, W $\frac{1}{2}$ NE $\frac{1}{4}$ and W $\frac{1}{2}$ of Sec. 12-13-53 .....	3,475.00
Lots 2 and 3, NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Sec. 13-13-53.....	788.00
Lots 1, 2, 3, N $\frac{1}{2}$ SW $\frac{1}{4}$ , N $\frac{1}{2}$ SE $\frac{1}{4}$ , W $\frac{1}{2}$ NE $\frac{1}{4}$ , SE $\frac{1}{4}$ NE $\frac{1}{4}$ , NW $\frac{1}{4}$ of Sec. 14-13-53.....	1,990.00

All of Sec. 15-13-53.....	\$ 995.00
SW $\frac{1}{4}$ and SE $\frac{1}{4}$ NW $\frac{1}{4}$ South of State Highway in Sec. 16-13-53.....	2,255.00
Lots 1 and 2, N $\frac{1}{2}$ SE $\frac{1}{4}$ , NE $\frac{1}{4}$ , W $\frac{1}{2}$ of Sec. 21-13-53 .....	2,370.00
Lots 1, 2, 3, 4, NW $\frac{1}{4}$ NE $\frac{1}{4}$ , N $\frac{1}{2}$ NW $\frac{1}{4}$ , SW $\frac{1}{4}$ - NW $\frac{1}{4}$ of Sec. 22-13-53.....	600.00
Lot 9 of Sec. 23-13-53.....	3.00

No sale shall be made for a price less than the fair market value thereof, as determined and fixed by the board prior to making this order of sale and all the above lands described as being in township 13 are subject to the lien of the unpaid balance of certain Bonds issued by the Upper Glendive-Fallon Irrigation District Jan. 1, 1923.

At 5 o'clock all business up for consideration having been disposed of a motion in due form adjourned the meeting Sine Die.

Approved:

H. F. PURDUM,  
Chairman.

Attest:

L. T. ELLIOT,  
Clerk of the Board. [45]

## Notice of Sale of Tax Title Property By Dawson County

By Order of the board of County Commissioners entered on its minutes of the 23rd day of March, 1940, the board will on May 4, 1940, beginning at 10 o'clock a.m. of said day at the front door of the Court House in the City of Glendive, Montana, offer



for sale at public auction all the right, title, interest, estate, lien, claim and demand of the State of Montana and County of Dawson in and to the following real property, which the board has appraised, determined and fixed the fair market value at the amount set after the description.

All of Sec. 15-14-53.....	\$ 500.00
W $\frac{1}{2}$ of Sec. 25-15-43.....	320.00
Lots 1 and 2, Sec. 26-15-55.....	40.00
All of Sec. 32-15-57.....	320.00
S $\frac{1}{2}$ of Sec. 4-16-54.....	500.00
N $\frac{1}{2}$ , N $\frac{1}{2}$ S $\frac{1}{2}$ of Sec. 28-17-51.....	480.00
NE $\frac{1}{4}$ of Sec. 8-18-57.....	80.00
All of Sec. 24-20-50.....	320.00
All of Sec. 20-20-51.....	320.00
SE $\frac{1}{4}$ of Sec. 9-20-53.....	400.00
S $\frac{1}{2}$ of Sec. 8-20-55.....	240.00
All of Sec. 34-22-52.....	640.00
Lots 1, 2, 3, 4, 5, 6, 7, 8, 11, 12 and 13, SE $\frac{1}{4}$ NW $\frac{1}{4}$ , NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Sec. 6-13-54.....	3,600.00
S $\frac{1}{2}$ of Sec. 1-13-53.....	3,600.00
S $\frac{1}{2}$ S $\frac{1}{2}$ of Sec. 10-13-53.....	1,300.00
S $\frac{1}{2}$ of Sec. 11-13-53.....	2,550.00
Lots 1, 2, 3, 4, W $\frac{1}{2}$ NE $\frac{1}{4}$ and W $\frac{1}{2}$ of Sec. 12-13-53 .....	3,475.00
Lots 2 and 3, NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Sec. 13-13-53.....	788.00
Lots 1, 2, 3, N $\frac{1}{2}$ SW $\frac{1}{4}$ , N $\frac{1}{2}$ SE $\frac{1}{4}$ , W $\frac{1}{2}$ NE $\frac{1}{4}$ , SE $\frac{1}{4}$ NE $\frac{1}{4}$ , NW $\frac{1}{4}$ of Sec. 14-13-53.....	1,990.00
All of Sec. 15-13-53.....	995.00
SW $\frac{1}{4}$ and SE $\frac{1}{4}$ NW $\frac{1}{4}$ South of State Highway in Sec. 16-13-53.....	2,255.00
Lots 1 and 2, N $\frac{1}{2}$ SE $\frac{1}{4}$ , NE $\frac{1}{4}$ , W $\frac{1}{2}$ of Sec. 21-13-53 .....	2,370.00
Lots 1, 2, 3, 4, NW $\frac{1}{4}$ NE $\frac{1}{4}$ , N $\frac{1}{2}$ NW $\frac{1}{4}$ , SW $\frac{1}{4}$ - NW $\frac{1}{4}$ of Sec. 22-13-53.....	600.00
Lot 9 of Sec. 23-13-53.....	3.00

No Sale shall be made for a price less than the market value thereof as fixed by the Board of County Commissioners prior to making this order

of sale and all the above lands described as being in Township 13 are subject to the lien of the unpaid balance of certain bonds issued by the Upper Glendive Fallon Irrigation district January 1, 1923.

Dated March 25, 1940.

L. T. ELLIOT,  
County Clerk,

M28 A 4-11

Affidavit of Publication

State of Montana,  
County of Dawson—ss.

G. J. Hoole, being duly sworn, on his oath, says he is, and during all the time hereinafter mentioned, has been Printer and Publisher of The Dawson County Review, a weekly newspaper of general circulation, printed and circulated at Glendive, in said County and State. That the said Notice of Sale of Tax Title Property by Dawson County a printed copy of which, cut from the columns of said newspaper, is hereunto attached and made a part hereof, was printed and published in said newspaper three (3) successive weeks, on the following dates, to-wit:

March 28, 1940

April 4-11, 1940

/s/ G. J. HOOLE.

Subscribed and sworn to before me this 4th day of May, A.D. 1940.

L. T. ELLIOT,  
County Clerk and Recorder, Dawson County,  
Montana. [46]

Office of the County Clerk and Recorder. L. T.  
Elliot, Clerk, Glendive, Montana.

State of Montana,  
County of Dawson—ss.

H. F. Purdum, G. A. Hicks and L. T. Elliot being  
duly sworn on their oath, do say that on the 24th  
day of March, A. D., 1940, they each posted a  
notice of sale listing county lands to be sold on  
May 4, 1940.

/s/ H. F. PURDUM,

/s/ G. A. HICKS,

/s/ L. T. ELLIOT.

Subscribed and Sworn to before me this 5th day  
of September, 1940.

[Seal] JAMES J. DVORAK,

Notary Public for the State of Montana residing  
at Glendive, Montana.

My Commission Expires Feb. 23, 1943. [47]

State of Montana,  
County of Dawson—ss.

H. F. Purdum, G. A. Hicks and L. T. Elliot being duly sworn on their oath, do say that on the 24th day of March, A. D., 1940 they each posted a notice of sale listing county lands to be sold on May 4, 1940.

H. F. PURDUM,  
G. A. HICKS,  
L. T. ELLIOT.

Subscribed and Sworn to before me this 5th day of September, 1940.

[Seal]     /s/ JAMES J. DVORAK,  
Notary Public for the State of Montana, residing  
at Glendive, Montana.

My Commission Expires Feb. 23, 1943. [48]



## Extra Session

Office of Board of County Commissioners, Glendive,  
Dawson County, Montana

May 4, 1940

The Commissioners met in extra session pursuant to resolution of March 23, 1940 and with all members and clerk present.

At 10 o'clock the board repaired to the front door of the Court House and proceeded to auction off the various pieces of land set out in the minutes of the Commissioners proceedings of March 23, 1940.

S $\frac{1}{2}$ Sec. 4-16-54 was struck off to Louis Highland for....	\$500.00
S $\frac{1}{2}$ Sec. 25-18-51 was struck off to Geo. Broghammer for .....	500.00
W $\frac{1}{2}$ Sec. 25-15-53 was struck off to John J. Nadwornick for .....	320.00
NE $\frac{1}{4}$ Sec. 8-18-57 was struck off to August Sobotka for	80.00
SE $\frac{1}{4}$ Sec. 13-17-51 was struck off to Leonard J. Quammen for .....	700.00
(less 2 acres)	
SE $\frac{1}{4}$ Sec. 9-20-53 was struck off to Howard Whitmer for .....	430.00
Lots 1 and 2, Sec. 26-15-55 was struck off to Wm. E. Stanfill for .....	40.00

No bids being offered for any of the other pieces of land duly advertised for this time the sale was closed and meeting duly adjourned.

Approved:

H. F. PURDUM,  
Chairman.

Attest:

L. T. ELLIOT,  
Clerk of the Board. [49]

Office of Board of County Commissioners, Glendive  
Dawson County, Montana

September 5, 1940

The Commissioners met at 9 o'clock a.m., with full membership present.

Elmer Wicks of the Farm Security Administration now appeared and took up with the board the purchase of County owned lands by the government. After discussion, the following resolution was read and moved for adoption, being duly seconded and put, same was unanimously carried.

Resolution

Whereas, the lands listed below were duly appraised by the Board of County Commissioners of Dawson County on March 23, 1940, who also on the said date ordered the Clerk of the Board to publish and post notices of sale in accordance with Section 2208.1, Revised Codes of Montana, 1935;

And, Whereas, affidavit of Publication and Posting are duly filed in the office of the Clerk and Recorder, and the date of sale of the said lands listed below are designated as May 4, 1940;

And Whereas, no bids were made or offered for the purchase of the following described lands at the date set for sale of same, namely, May 4, 1940; the land so described with acreage being as follows, to-wit:

Southwest Quarter (SW $\frac{1}{4}$ ) and the Southeast Quarter (SE $\frac{1}{4}$ ) of Section One (1); South Half of the Southeast Quarter (S $\frac{1}{2}$ SE $\frac{1}{4}$ )

and South Half of the Southwest Quarter ( $S\frac{1}{2}SW\frac{1}{4}$ ) both in Section Ten (10), South Half ( $S\frac{1}{2}$ ) of Section Eleven (11); Lots One (1), Two (2), Three (3), Four (4), West Half of the Northeast Quarter ( $W\frac{1}{2}NE\frac{1}{4}$ ), East Half of the Northeast Quarter ( $E\frac{1}{2}NW\frac{1}{4}$ ), West Half of the Northwest Quarter ( $W\frac{1}{2}NW\frac{1}{4}$ ), Southwest Quarter ( $SW\frac{1}{4}$ ) of Section Twelve (12); Lots Two (2), Three (3), Northwest Quarter of the Northwest Quarter ( $NW\frac{1}{4}NW\frac{1}{4}$ ) of Section Thirteen (13); Lots One (1), Two (2), Three (3), Northwest Quarter of the Northeast Quarter ( $NW\frac{1}{4}NE\frac{1}{4}$ ), South Half of the Northeast Quarter ( $S\frac{1}{2}NE\frac{1}{4}$ ), Northwest Quarter ( $NW\frac{1}{4}$ ), North Half of the South Half ( $N\frac{1}{2}S\frac{1}{2}$ ) of Section Fourteen (14), All of Section Fifteen (15); Southwest Quarter ( $SW\frac{1}{4}$ ) and that portion of the Southeast Quarter of the Northwest Quarter ( $SE\frac{1}{4}NW\frac{1}{4}$ ) of Section Sixteen (16) lying Southeast of United States Highway No. 10, more particularly described as follows: Beginning at the Southeast (SE) Corner of the Southeast Quarter of the Northwest Quarter ( $SE\frac{1}{4}NW\frac{1}{4}$ ), thence west along the South line of said Southeast Quarter of the Northwest Quarter ( $SE\frac{1}{4}NW\frac{1}{4}$ ), a distance of one thousand three hundred and twenty (1,320) feet, thence North along the west line of said Southeast Quarter of the Northwest Quarter ( $SE\frac{1}{4}NW\frac{1}{4}$ ), a distance of nine hundred thirty-one and five-tenths (931.5) feet to the South line

of United States Highway No. 10, thence North sixty-seven degrees and fourteen minutes ( $67^{\circ} 14'$ ) East along the south line of said Highway, a distance of nine hundred nineteen and nine-tenths (919.9) feet to its intersection with the North line of said Southeast Quarter of the Northwest Quarter ( $SE\frac{1}{4}NW\frac{1}{4}$ ); thence East along the North line of said Southeast Quarter of the Northeast Quarter ( $SE\frac{1}{4}NW\frac{1}{4}$ ), a distance of four hundred thirty-eight and five tenths (438.5) feet; thence South along the East line of said Southeast Quarter of the Northwest Quarter ( $SE\frac{1}{4}NW\frac{1}{4}$ ), a distance of one thousand three hundred twenty (1,320) feet to the point of [50] beginning, containing thirty-five and eighty-five hundredths (35.85) acres more or less; North Half ( $N\frac{1}{2}$ ), Southwest Quarter ( $SW\frac{1}{4}$ ), North Half of the Southeast Quarter ( $N\frac{1}{2}SE\frac{1}{4}$ ), Lots One (1), Two (2) of Section Twenty-one (21); Lots One (1), Two (2), Three (3), Four (4) Northwest Quarter of the Northeast Quarter ( $NW\frac{1}{4}NE\frac{1}{4}$ ), North Half of the Northwest Quarter ( $N\frac{1}{2}NW\frac{1}{4}$ ), Southwest Quarter of the Northwest Quarter ( $SW\frac{1}{4}NW\frac{1}{4}$ ) of Section Twenty-two (22), Lot Nine (9) of Section Twenty-three (23), all in Township Thirteen (13) North, Range Fifty-three (53) East, M. P. M. Lots One (1), Two (2), Three (3), Four (4), Five (5), Six (6), Seven (7), Eight (8), Eleven (11), Twelve (12), Thirteen (13), Southeast Quarter of the Northwest Quarter ( $SE\frac{1}{4}NW\frac{1}{4}$ ), North-



east Quarter of the Southwest Quarter (NE $\frac{1}{4}$  SW $\frac{1}{4}$ ) of Section Six (6), Township Thirteen (13) North, Range Fifty-four (54) East, Montana Principal Meridian, containing in all 4,164.36 Acres more or less.

And, Whereas, the said County of Dawson, acting by and through the Board of County Commissioners, desires to option the above described lands to the United States of America, by and through the Farm Security Administration, an agency thereof,

Now, Therefore, Be It Resolved by the Board of County Commissioners of Dawson County, State of Montana, that it hereby execute an option for the above described lands to the United States of America for the sum of twenty three thousand five hundred twenty six and no/100 dollars (\$23,526.00), said sum being not less than 90% of the appraised value thereof.

Dated this 5th day of September, 1940.

H. F. PURDUM,  
Chairman.

G. A. HICKS,  
Member.

F. E. BROWN,  
Member.

Attest:

L. T. ELLIOT,  
Clerk of the Board.

After executing the option a copy of same was ordered filed in the office of the Clerk and Recorder.

At 5 o'clock all matters up for consideration having been disposed of a motion duly made and carrier adjourned the session sine die.

Approved:

H. F. PURDUM,  
Chairman.

Attest:

L. T. ELLIOT,  
Clerk of the Board. [51]

Office of County Commissioners, Glendive,  
Dawson County, Montana

September 4, 1941

Commissioners met at 9 o'clock a.m., in order to conclude the session with all members present.

Dan Kelly of the Farm Security Administration now appeared and presented an option whereby the United States Government proposes to buy certain tracts of land fully described in the Option thereof also set out in Commissioners' Proceedings of Book 10, Pg. 177.

Upon motion duly made and carried signatures were authorized and option executed according to form.

At 5 o'clock all business up for consideration having been disposed of, a motion duly made and carried, brought the session to a sine die adjournment.

Approved:

G. A. HICKS,  
Chairman.

Attest:

L. T. ELLIOT,  
Clerk of the Board. [52]

[Affidavits of mailing to: P. F. Leonard and C. W. Buntin attached.]

[Endorsed]: Filed May 20, 1944. [54]

Thereafter, on May 20, 1944, a Reply of Dawson County was duly filed herein, in the words and figures following, to-wit:

[Title of District Court and Cause.]

### REPLY

Comes now the defendant Dawson County, Montana, a body politic and corporate, and replying to the Answer, Counter Claim and Cross Claim of Mary Hagen, E. B. Clark and Minnie R. Evans admits, denies and alleges as follows, to-wit:

Replying to paragraphs numbered 1 and 3 and subdivisions a, b, d, e, f, g, i, j, k and l in paragraph 4, this defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in said Answer, Counter Claim and Cross Claim and therefore denies the same and each and every part thereof, and specifically denies that part of paragraph 4 subdivision c wherein said defendants allege that "said bonds and the assessments levied by said district were a first and prior lien on all of the said real estate within said district and all of the property of said district became liable for the payment of said bonds and the interest thereon."

As to the allegations in paragraph 4 subdivision h, defendant alleges that the proceedings taken by it under the laws of Montana to acquire title to said lands under tax deed proceedings fully and completely divested the answering defendants Mary



Hagen, E. B. Clark and Minnie R. Evans of all right, title, interest or claim to any part of the compensation paid into the registry of this Court as and for the value of the lands condemned in this action, which were prior to said condemnation proceedings sold by the said Dawson County, [56] Montana to the United States of America, as alleged in the answer of said defendant filed herein, reference to which is hereby specifically made; and defendant specifically denies that part of paragraph 4 subdivision h wherein said defendants Mary Hagen, E. B. Clark and Minnie R. Evans allege that "the claims of the said counties to said lands and to compensation are subject to, inferior, and subsequent to said bonds and the liens thereof and the rights of these defendants."

Wherefore, said defendant Dawson County, Montana, having fully replied to the answer, counter claim, and cross claim of said defendants Mary Hagen, E. B. Clark and Minnie R. Evans, prays that judgment be entered herein in accordance with its answer and petition for distribution.

E. W. POPHAM,

Glendive, Montana,

D. C. WARREN,

Glendive, Montana,

Attorneys for defendant

Dawson County, Montana.

[Affidavits of mailing to: P. F. Leonard and C. W. Buntin attached.]

[Endorsed]: Filed May 20, 1944. [59]

Thereafter, on July 11, 1944, an Order for Distribution was duly filed and entered herein, in the words and figures following, to-wit: [60]

[Title of District Court and Cause.]

### ORDER FOR DISTRIBUTION

The petition of Dawson County, Montana, for distribution of the compensation paid into the registry of the Court on account of condemning lands standing in the name of Dawson County, Montana, designated as tracts 494-1, 494-2, 494-3, 494-4, 494-5, 494-6, 494-7, 494-8, 494-9, 494-10, 494-11, 494-12, 494-13 and 494-14, having been duly presented to the Court, and it appearing to the Court from testimony submitted that Dawson County, Montana, was the record owner of the lands and claimed all of the lands at the time Declaration of Taking was filed and money deposited in the registry of the Court, save and except tract number 494-1-4 as to Lots 1, 2 and 13 of Sec. 6, Tp. 13 N, R. 54 E, and general taxes in amount of \$249.68 and it further appearing to the Court that there were unpaid General taxes assessed, delinquent and unpaid at the time Dawson County, Montana, applied for tax deeds for the respective tracts and tax deeds were issued to it by the County Treasurer, in the amount of Ten thousand six hundred twenty-eight and 57/100 (\$10,628.57) Dollars and that there were delinquent, unpaid assessments made and unpaid on account of the Upper Glendive Fallon Irrigation District, in the amount of Forty-one thousand six

hundred sixty-two and 98/100 Dollars and that Dawson County, Montana, had a first and superior lien against the lands condemned as against any and all other persons for the general taxes, delinquent and unpaid, at the time tax title deeds were executed and delivered to it for the said lands and that no person or persons could establish a claim as against Dawson County, Montana, to the portion of the compensation deposited in the registry of the Court representing the delinquent, unpaid taxes outstanding at the time tax deeds were taken, and is entitled to distribution of this portion of the compensation without notice to others before same is distributed, and the Court being fully advised in the premises—

It Is the Order of the Court That out of the compensation in the amount of Twenty-three thousand five hundred twenty-six Dollars (\$23,526.00) deposited in the registry of the Court as the estimated compensation for the taking of the tracts of land above referred to, that there be distributed to the County Treasurer of Dawson County, Montana, at Glendive, Montana, Ten thousand six hundred twenty-eight and 57/100 Dollars (\$10,628.57), and that the remainder of the compensation deposited in the registry of the Court on account of the taking of said tracts remain impounded in the registry of the Court until further order or disposition thereof is made, and the Clerk will make distribution accordingly.

Dated this the 11th day of July, 1944.

CHARLES N. PRAY,

United States District Judge.

[Endorsed]: Filed and entered July 11, 1944.

Thereafter, on October 1, 1945, the Return and Report of Commissioners was duly filed herein, in the words and figures following, to-wit: [63]

[Title of District Court and Cause.]

## RETURN AND REPORT OF COMMISSIONERS

We, the undersigned, Cecil Zody, Glenn Hitchcock, and Ed Kempton, the duly appointed, qualified and acting commissioners to appraise, assess and determine the just compensation incident to taking and acquiring the lands in their entirety by the plaintiff for the public use, and particularly for the Buffalo Rapids Project, and all things incidental thereto, situate in the Counties of Prairie and Dawson, State of Montana, described as follows, to wit:

### Tract No. 494-1

South half ( $S1\frac{1}{2}$ ) of Section One (1) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana.

### Tract No. 494-2

South half of the Southwest quarter ( $S1\frac{1}{2}SW\frac{1}{4}$ ) of Section Ten (10) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana.

### Tract No. 494-3

South half of the Southeast quarter ( $S1\frac{1}{2}SE\frac{1}{4}$ ) of Section Ten (10) in Township Thirteen (13)



North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana.

Tract No. 494-4

South half ( $S\frac{1}{2}$ ) of Section Eleven (11), Lots Two (2) and Three (3), Northwest quarter of the Northwest quarter ( $NW\frac{1}{4}NW\frac{1}{4}$ ) of Section Thirteen (13), all of fractional Section Twenty-one (21) and Lot Eight (8) of Section Twenty-three (23) all in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana.

Tract No. 494-5

Northwest quarter ( $NW\frac{1}{4}$ ), West half of the Northeast quarter ( $W\frac{1}{2}NE\frac{1}{4}$ ) of Section Twelve (12) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana. [64]

Tract No. 494-6

Southwest quarter ( $SW\frac{1}{4}$ ) of Section Twelve (12) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana.

Tract No. 494-7

Lots One (1), Two (2), Three (3) and Four (4), Section Twelve (12) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana.

## Tract No. 494-8

Lots One (1), and Two (2), North half of the Southwest quarter ( $N\frac{1}{2}SW\frac{1}{4}$ ) of Section Fourteen (14) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian.

## Tract No. 494-9

Southwest quarter of the Northeast quarter ( $SW\frac{1}{4}NE\frac{1}{4}$ ), and Southeast quarter of the Northeast quarter ( $SE\frac{1}{4}NE\frac{1}{4}$ ), Northwest quarter of the Northeast quarter ( $NW\frac{1}{4}NE\frac{1}{4}$ ), North half of the Southeast quarter ( $N\frac{1}{2}SE\frac{1}{4}$ ) and Lot Three (3) of Section Fourteen (14) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana.

## Tract No. 494-10

Northwest quarter ( $NW\frac{1}{4}$ ) of Section Fourteen (14) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana.

## Tract No. 494-11

All of Section Fifteen (15) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana.

## Tract No. 494-12

Southwest quarter ( $SW\frac{1}{4}$ ), That part of the Southeast quarter of the Northwest quarter ( $SE\frac{1}{4}NW\frac{1}{4}$ ) lying southeast of U. S. Highway No. 10, and more particularly described as follows:

Beginning at the southeast corner of the Southeast quarter of the Northwest quarter ( $SE\frac{1}{4}$ - $NW\frac{1}{4}$ ), thence west along the south line of said Southeast quarter of the Northwest quarter ( $SE\frac{1}{4}$ - $NW\frac{1}{4}$ ), a distance of 1320 feet, thence north along the west line of said  $SE\frac{1}{4}$   $NW\frac{1}{4}$  a distance of 931.5 feet to the south line of U. S. Highway No. 10, thence north  $67^{\circ} 14'$  east along the south line of said highway a distance of 919.9 feet to its intersection with the North line of said  $SE\frac{1}{4}$   $NW\frac{1}{4}$ , thence east along the north line of said  $SE\frac{1}{4}$   $NW\frac{1}{4}$  a distance of 438.5 feet, thence South along the East line of said  $SE\frac{1}{4}$   $NW\frac{1}{4}$  a distance of 1320 feet to the point of beginning, containing 35.85 acres, more or less, all in Section 16, Township 13 North of Range 53 East of the Montana Meridian, Montana.

Tract No. 494-13

Lots One (1), Two (2), Three (3), Four (4), Northwest quarter of the Northeast quarter ( $NW\frac{1}{4}$ - $NE\frac{1}{4}$ ), North half of the Northwest quarter ( $N\frac{1}{2}$   $NW\frac{1}{4}$ ), Southwest quarter of the Northwest quarter ( $SW\frac{1}{4}$   $NW\frac{1}{4}$ ) of Section Twenty-two (22) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana. [65]

Tract No. 494-14A

Lots One (1), Two (2) and Thirteen (13) of Section Six (6) in Township Thirteen (13) North of Range Fifty-four (54) East of the Montana Principal Meridian, Montana.

## Tract No. 494-14B

Lots Three (3), Four (4), Five (5), Six (6), Seven (7), Eight (8), Eleven (11) and Twelve (12), Southeast quarter of the Northwest quarter ( $SE\frac{1}{4} NW\frac{1}{4}$ ), Northeast quarter of the Southwest quarter ( $NE\frac{1}{4} SW\frac{1}{4}$ ) of Section Six (6), in Township Thirteen (13) North of Range Fifty-four (54) East of the Montana Principal Meridian, Montana.

## Tract No. 1-27

That portion of the Northwest quarter ( $NW\frac{1}{4}$ ) lying northerly of the following described line: Beginning at a point on the west line of the said Section Sixteen (16) which point lies south 2262.5 feet from the northwest corner of said Section 16, thence north  $67^{\circ} 14'$  East, a distance of 2863 feet to a point on the east line of said  $NW\frac{1}{4}$  which point lies south 1154.5 feet from the northeast corner of the  $NW\frac{1}{4}$  of Section 16 in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana.

## Tracts 1-47 and 1-53

Lot Four (4), and the Northeast quarter of the Northeast quarter ( $NE\frac{1}{4} NE\frac{1}{4}$ ) of Section Fourteen (14) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana,

all lying and being in Dawson County, Montana, and,

## Tract No. 511-1

North half of the Northeast quarter ( $N\frac{1}{2} NE\frac{1}{4}$ ), West half of the Southwest quarter ( $W\frac{1}{2} SW\frac{1}{4}$ )



of Section Twenty (20) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana.

Tract No. 511-2

East half of the Southwest quarter ( $E\frac{1}{2}$   $SW\frac{1}{4}$ ), Southeast quarter ( $SE\frac{1}{4}$ ), South half of the Northeast quarter ( $S\frac{1}{2}$   $NE\frac{1}{4}$ ) of Section Twenty (20) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana.

Tract No. 511-3

Lots One (1) and Two (2) of Section Twenty-eight (28) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana.

Tract No. 511-4

Lots Two (2), Three (3) and Four (4), Northwest quarter ( $NW\frac{1}{4}$ ), North half of the Northeast quarter ( $N\frac{1}{2}$   $NE\frac{1}{4}$ ), Northwest quarter of the South west quarter ( $NW\frac{1}{4}$   $SW\frac{1}{4}$ ), less one acre in the extreme northwest corner of the  $SE\frac{1}{4}$   $NW\frac{1}{4}$ , said tract being dimensions of 10 rods north and south by 16 rods east and west, in Section Twenty-nine (29) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana.

Tract No. 511-5

Southeast quarter of the Southeast quarter ( $SE\frac{1}{4}$   $SE\frac{1}{4}$ ) of Section Thirty (30) in Township Thirteen

(13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana. [66]

Tract No. 511-6

Lots Three (3) and Four (4) of Section Thirty (30) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana.

Tract No. 511-7

Northeast quarter ( $NE\frac{1}{4}$ ) of Section Thirty (30), North half of of the Southeast quarter ( $N\frac{1}{2}SE\frac{1}{4}$ ) of Section Thirty (30) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana,

all lying and being in Prairie County, Montana.

in pursuance of the Court's instructions, do hereby determine, assess and fix the just compensation for the taking of the above described lands by the plaintiff on April 27th, 1942, as follows:

For Tract No. 494-1, the sum of Three thousand three hundred sixteen and  $10/100$  Dollars (\$3,316.10);

For Tract No. 494-2, the sum of Six hundred eighty-four and  $40/100$  Dollars (\$684.40);

For Tract No. 494-3, the sum of Seven hundred thirty-four and  $no/100$  Dollars (\$734.00);

For Tract No. 494-4, the sum of Five thousand five hundred eighty-seven and  $13/100$  Dollars (\$5,587.13);

For Tract No. 494-5, the sum of One thousand nine hundred twenty and no/100 Dollars (\$1,920.00);

For Tract No. 494-6, the sum of One thousand two hundred eighty and no/100 Dollars (\$1,280.00);

For Tract No. 494-7, the sum of Two hundred seventy-five and 08/100 Dollars (\$275.08);

For Tract No. 494-8, the sum of Six hundred eighty and 50/100 Dollars (\$680.50);

For Tract No. 494-9, the sum of Nine hundred ninety-three and 60/100 Dollars (\$993.60);

For Tract No. 494-10, the sum of Three hundred twenty and no/100 Dollars (\$320.00);

For Tract No. 494-11, the sum of Nine hundred ninety-five and no/100 Dollars (\$995.00);

For Tract No. 494-12, the sum of Two thousand two hundred forty-two and 65/100 Dollars (\$2,242.65); [67]

For tract No. 494-13, the sum of Six Hundred six and 90/100 Dollars (\$606.90);

For Tract No. 494-14A, the sum of Five hundred seventy-five and no/100 Dollars (\$575.00);

For Tract No. 494-14B, the sum of Thirty-three hundred fifteen and 64/100 Dollars (\$3,315.64);

For Tract No. 1-27, the sum of Seven hundred fifty-eight and no/100 Dollars (\$758.00);

For Tract No. 1-47 and tract No. 1-53, the sum of Four hundred Twenty-five and no/100 Dollars (\$425.00);

For Tract No. 511-1, the sum of One thousand seven hundred thirty and no/100 Dollars (\$1,730.00);

For Tract No. 511-2, the sum of One thousand five hundred seventy and no/100 Dollars (\$1,570.00);

For Tract No. 511-3, the sum of Two hundred and no/100 Dollars (\$200.00);

For Tract No. 511-4, the sum of One thousand eight hundred and no/100 Dollars (\$1,800.00);

For Tract No. 511-5, the sum of One hundred fifty and no/100 Dollars (\$150.00);

For Tract No. 511-6, the sum of Eight hundred ninety and no/100 Dollars (\$890.00);

And for Tract No. 511-7, the sum of One thousand three hundred forty and no/100 Dollars (\$1,340.00);

Making a total for tracts 511-1, 511-2, 511-3, 511-4, 511-5, 511-6 and 511-7, Seven thousand six hundred eighty and no/100 Dollars (\$7,680.00).

The just compensation so assessed and fixed for the lands above described includes the improvements upon the said lands.

Dated this the 29 day of September, 1945.

G. O. HITCHCOCK,

Chairman,

E. F. KEMPTON,

Secretary,

C. H. ZODY,

Commissioner.

[Endorsed]: Filed Oct. 1, 1945. [68]



Thereafter, on December 5, 1945, Final Judgment in Condemnation was filed and entered herein, in the words and figures following, to-wit: [69]

The United States of America, In the United  
States District Court, District of Montana,  
Billings Division

Civil No. 348

THE UNITED STATES OF AMERICA,  
Plaintiff,  
vs.  
PAUL T. MARKEY, et al.,  
Defendants.

### FINAL JUDGMENT IN CONDEMNATION

This cause having been brought by the filing of the complaint and amended complaint herein and the defendants above named, and each of them having been served with process, and the defendants, Peter B. Tjensvold and Lillian Tjensvold, his wife, Martin Tjensvold and Mrs. Martin Tjensvold, his wife, Michael J. Hughes as Executor and Trustee under the last will and testament of Robert Henderson, deceased, Alexander Seifert, Richard S. Schmid, Conrad Zankle, Mary Hagan, E. B. Clark, Minnie R. Evans, Dawson County, Montana, a body politic and corporate, and Daniel P. Dempsey, as guardian ad litem of Albert Howard, a

minor, having appeared herein and filed their respective answers, and Judgment having been previously entered herein as to tract number 1-12, and the defendants, Paul T. Markey and Mrs. Paul T. Markey, his wife, if any; Oscar R. Wilburn and Helen S. Wilburn, husband and wife; Eva Lee; Mathilda Powderly; Mae Carlisle; Florence Dion; Edwin Powderly and Mrs. Edwin Powderly, his wife, if any; Eugene Powderly and Mrs. Eugene Powderly, his wife, if any; L. A. Fisher and Mrs. L. A. Fisher, his wife, if any; The Scottish American Mortgage Company, Limited; O. M. [71] Corwin and Mrs. O. M. Corwin, his wife, if any; David Fountain, Willard Fountain, and George Fountain, heirs at law of Joseph W. Fountain, deceased; M. E. Howard, Guardian of Albert Howard, a minor; Mrs. Willard Fountain, wife, if any, of Willard Fountain; Mrs. George Fountain, wife, if any of George Fountain; David Fountain and Mrs. David Fountain, his wife, if any; Northwestern Mortgage Security Company, a corporation; Montana State Bank, Fallon, Montana, a banking corporation; W. Elf Brown Superintendent of State Banks of the State of Montana and ex officio receiver of Montana State Bank, Fallon, Montana, a banking corporation; Frederick J. Banister; Mattie A. Banister, the wife of Frederick J. Banister, if any; Edna Yale; Allen W. Yale and Mrs. Allen W. Yale, his wife, if any; Ruth Petterson; The Merchants National Bank of Glendive, Montana, a banking corporation; Florence Jessie Louis;

Midland Coal and Lumber Company, a corporation; John B. Weber and Margaret E. Weber, his wife; Carolyn M. Forquer and Bernard B. Forquer, her husband; Charles G. Pearce, Trustee; Alfred A. Peacock and Mrs. Alfred A. Peacock, his wife, if any; Claud H. Young and Mrs. Claud H. Young, his wife, if any; Gabriel E. Tjensvold and Mrs. Gabriel E. Tjensvold, his wife, if any; Sinclair Molding Company, a corporation; Security Agency and Loan Corporation; Upper Glendive-Fallon Irrigation District; W. C. Sloan and Mrs. W. C. Sloan, his wife, if any; Hester G. Johnson; Frank P. Abbott, executor of the last will and testament of Charles A. Thurston, deceased; Eleanor B. Doremus, Kenneth H. Barnard and Mary H. Barnard, legatees of Charles A. Thurston, deceased; Mrs. Kenneth H. Barnard, wife, if any, of Kenneth H. Barnard; Mary Olney Abbott, devisee of Charles A. Thurston, deceased, Edith Austin, sole and only heir at law of Charles A. Thurston, deceased; the unknown heirs at law, if any, of Charles A. Thurston, deceased; Elsie L. Clark, The Glendive Land and Irrigation Company of Glendive, a corporation; Prairie County, Montana, a body politic and corporate; Northern Pacific Railroad Company, a corporation; School District No. 10, a municipal corporation of Dawson County, Montana; Michael Dahlke; Farmers State Bank, a corporation; O. M. Aarseth; Theo. J. Hanson; J. A. Pinkava; George Coakley; L. C. Churchill; Perry Harrison; Underwood & Co., a corporation; Henry Martin; Eva I.

Orr; Rena A. Eisley, Administratrix of the estate of R. C. Eisley, deceased; Paul E. Martin; Morrison & Company, a corporation; Isaac A. Milton and Mrs. Isaac A. Milton, individually and as husband and wife; Albert Anderson, N. M. Courselle; Harry F. Johnson, Administrator of the Estate of Everett C. Johnson, deceased; [72] Maxine Pitsch; Erick G. Eklund; Ardell W. Hansen; Administratrix of the Estate of O. F. Hansen, deceased; Ainsworth R. Hansen, Mary A. Hansen, Evelyn L. Burgess, Violette L. Davis and Lyndon E. Hansen, individually and as heirs of O. F. Hansen, deceased; Russell F. Olson; F. Leon Ottawa; C. C. Wiemals; Ruth A. McKinlay; Oscar J. Olm; Henry Anderson; C. M. Anderson; Clara L. Anderson Aubey; Latsch & Son Company, a corporation; First National Bank & Trust Company of Minneapolis, a corporation; Esther L. Kemp; Victoria M. McAlmon; I. Hesdorffer, and all persons unknown, claiming any interest in the lands herein described or any part thereof, and each of them having defaulted and their defaults to appear and answer having been duly entered and the Court having thereafter entered an order determining the property and the whole thereof described therein was required for the public use and commissioners having thereafter been appointed by the Court to ascertain, appraise and assess the just compensation payable for the lands being condemned described herein, and the commissioners having thereafter made their return into Court fixing the compensation payable for the



respective tracts hereinafter designated and described, in the following sums, to wit:

For tract 494-1.....	\$3,316.10
For tract 494-2.....	684.40
For tract 494-3.....	734.00
For tract 494-4.....	5,587.13
For tract 494-5.....	1,920.00
For tract 494-6.....	1,280.00
For tract 494-7.....	275.08
For tract 494-8.....	680.50
For tract 494-9.....	993.60
For tract 494-10.....	320.00
For tract 494-11.....	995.00
For tract 494-12.....	2,242.65
For tract 494-13.....	606.90
For tract 494-14A.....	575.00
For tract 494-14B.....	3,315.64
For tract 1-27.....	758.00
For tracts 1-47 and 1-53.....	425.00
For tract 511-1.....	1,730.00
For tract 511-2.....	1,570.00
For tract 511-3.....	200.00
For tract 511-4.....	1,800.00
For tract 511-5.....	150.00
For tract 511-6.....	890.00
For tract 511-7.....	1,340.00

and the awards being acceptable to the Secretary of Agriculture and notice of filing the return of the commissioners having been duly issued by the Clerk of the Court and thirty days time having elapsed since the service of notice of filing the return of the commissioners on the plaintiff and appearing defendants, [73] and the plaintiff nor defendants nor either of them having appealed from the awards of the commissioners for the respective tracts or any of them, and the Court being fully advised in the premises——

Now Therefore, on motion of John B. Tansil, United States Attorney, and C. W. Buntin, Special Assistant to the United States Attorney, attorneys for the plaintiff herein.

The Court now adopts the awards of the commissioners of compensation for the respective tracts of land hereinafter described, and,

It Is Ordered, Adjudged and Decreed That the respective sums awarded and returned by the commissioners for the respective tracts of land, constitute and are, full, just compensation for the condemning and taking of said tracts of land.

It Is Further Ordered, Adjudged and Decreed that the tracts of land lying in the County of Dawson, State of Montana, designated and described as follows, to wit:

Tract No. 494-1

South half ( $S1\frac{1}{2}$ ) of Section One (1), in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana.

Tract No. 494-2

South half of the Southwest quarter ( $S1\frac{1}{2}$   $SW\frac{1}{4}$ ) of Section Ten (10) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana.

Tract No. 494-3

South half of the Southeast quarter ( $S1\frac{1}{2}$   $SE\frac{1}{4}$ ) of Section Ten (10) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana.

## Tract No. 494-4

South half ( $S1\frac{1}{2}$ ) of Section Eleven (11), Lots Two (2) and Three (3), Northwest quarter of the Northwest quarter ( $NW\frac{1}{4}NW\frac{1}{4}$ ) of Section Thirteen (13) all of fractional Section Twenty-one (21) and Lot Eight (8) of Section Twenty-three (23) all in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana.

## Tract No. 494-5

Northwest quarter ( $NW\frac{1}{4}$ ), West half of the Northeast quarter ( $W\frac{1}{2} NE\frac{1}{4}$ ) of Section Twelve (12) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana.

## Tract No. 494-6

Southwest quarter ( $SW\frac{1}{4}$ ) of Section Twelve (12) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana. [74]

## Tract No. 494-7

Lots One (1), Two (2), Three (3), and Four (4), of Section Twelve (12) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana.

## Tract No. 494-8

Lots One (1), and Two (2), North half of the Southwest quarter ( $N\frac{1}{2} SW\frac{1}{4}$ ) of Section Fourteen (14) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana.

## Tract No. 494-9

Southwest quarter of the Northeast quarter (SW $\frac{1}{4}$  NE $\frac{1}{4}$ ) and Southeast quarter of the Northeast quarter (SE $\frac{1}{4}$  NE $\frac{1}{4}$ ), Northwest quarter of the Northeast quarter (NW $\frac{1}{4}$  NE $\frac{1}{4}$ ), North half of the Southeast quarter (N $\frac{1}{2}$  SE $\frac{1}{4}$ ) and Lot Three (3) of Section Fourteen (14) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana.

## Tract No. 494-10

Northwest quarter (NW $\frac{1}{4}$ ) of Section Fourteen (14) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana.

## Tract No. 494-11

All of Section Fifteen (15) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana.

## Tract No. 494-12

Southwest quarter (SW $\frac{1}{4}$ ), that part of the Southeast quarter of the Northwest quarter (SE $\frac{1}{4}$  NW $\frac{1}{4}$ ) lying southeast of U. S. Highway No. 10, and more particularly described as follows:

Beginning at the Southeast corner of the SE $\frac{1}{4}$  NW $\frac{1}{4}$ , thence west along the south line of said SE $\frac{1}{4}$  NW $\frac{1}{4}$  a distance of 1320 feet thence north along the west line of said SE $\frac{1}{4}$  NW $\frac{1}{4}$  a distance of 931.5 feet to the south line of U. S. Highway No. 10, thence north 67° 14' East along the south line of said highway a distance of 919.9 feet to its intersection with the North line of said SE $\frac{1}{4}$  NW $\frac{1}{4}$ ,



thence east along the north line of said SE $\frac{1}{4}$  NW $\frac{1}{4}$  a distance of 438.5 feet, thence south along the east line of said SE $\frac{1}{4}$  NW $\frac{1}{4}$  a distance of 1320 feet to the point of beginning, containing 35.85 acres, more or less, all in Section Sixteen (16), Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Meridian, Montana.

Tract No. 494-13

Lots One (1), Two (2), Three (3), Four (4), Northwest quarter of the Northeast quarter (NW $\frac{1}{4}$  NE $\frac{1}{4}$ ), North half of the Northwest quarter (N $\frac{1}{2}$  NW $\frac{1}{4}$ ), Southwest quarter of the Northwest quarter (SW $\frac{1}{4}$  NW $\frac{1}{4}$ ) of Section Twenty-two (22) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Meridian, Montana.

Tract No. 494-14A

Lots One (1), Two (2) and Thirteen (13) of Section Six (6) in Township Thirteen (13) North of Range Fifty-four (54) East of the Montana Principal Meridian, Montana. [75]

Tract No. 494-14B

Lots Three (3), Four (4), Five (5), Six (6), Seven (7), Eight (8), Eleven (11) and Twelve (12), Southeast quarter of the Northwest quarter (SE $\frac{1}{4}$  NW $\frac{1}{4}$ ), Northeast quarter of the Southwest quarter (NE $\frac{1}{4}$  SW $\frac{1}{4}$ ) of Section Six (6) in Township Thirteen (13) North of Range Fifty-four (54) East of the Montana Principal Meridian, Montana.

Tract No. 1-27

That portion of the Northwest quarter (NW $\frac{1}{4}$ ) lying northerly of the following described line:

Beginning at a point on the west line of said Section Sixteen (16), which point lies south 2262.5 feet from the northwest corner of said Section 16, thence north  $67^{\circ} 14'$  East a distance of 2863 feet to a point on the east line of said NW $\frac{1}{4}$  which point lies south 1154.5 feet from the Northeast corner of the NW $\frac{1}{4}$  of Section 16 in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana.

Tract Nos. 1-47 and 1-53

Lot Four (4) and the Northeast quarter of the Northeast quarter (NE $\frac{1}{4}$  NE $\frac{1}{4}$ ) of Section Fourteen (14) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana.

And that portion of the lands situate in the County of Prairie, State of Montana, to wit:

Tract No. 511-1

North half of the Northeast quarter (N $\frac{1}{2}$  NE $\frac{1}{4}$ ), West half of the Southwest quarter (W $\frac{1}{2}$  SW $\frac{1}{4}$ ) of Section Twenty (20) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana.

Tract No. 511-2

East half of the Southwest quarter (E $\frac{1}{2}$  SW $\frac{1}{4}$ ), Southeast quarter (SE $\frac{1}{4}$ ), South half of the Northeast quarter (S $\frac{1}{2}$  NE $\frac{1}{4}$ ) of Section Twenty (20) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana.

## Tract No. 511-3

Lots One (1) and Two (2), of Section Twenty-eight (28) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana.

## Tract No. 511-4

Lots Two (2), Three (3) and Four (4), Northwest quarter ( $NW\frac{1}{4}$ ), North half of the Northeast quarter ( $N\frac{1}{2} NE\frac{1}{4}$ ) and Northwest quarter of the Southwest quarter ( $NW\frac{1}{4} SW\frac{1}{4}$ ) less one acre in the extreme northwest corner of the Southeast quarter of the Northwest quarter ( $SE\frac{1}{4} NW\frac{1}{4}$ ), said tract being dimensions of ten rods north and south by sixteen rods east and west in Section Twenty-nine (29) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian.

## Tract No. 511-5

Southeast quarter of the Southeast quarter ( $SE\frac{1}{4} SE\frac{1}{4}$ ) of Section Thirty (30) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana. [76]

## Tract No. 511-6

Lots Three (3) and Four (4) of Section Thirty (30) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana.

## Tract No. 511-7

Northeast quarter ( $NE\frac{1}{4}$ ) of Section Thirty (30) North half of the Southeast quarter ( $N\frac{1}{2} SE\frac{1}{4}$ ) of

Section Thirty (30) in Township Thirteen (13) North of Range Fifty-three (53) East of the Montana Principal Meridian, Montana.

be and they are hereby condemned in fee simple for the public use, to wit: For the construction, operation and maintenance of project for utilization, reclamation and irrigation of arid and semi-arid lands and to further an effective rehabilitation program and stabilization of the agricultural economy settlement of citizens on lands reclaimed and irrigated and for the improvement of lands within the project's boundaries and all things incidental thereto for the Buffalo Rapids Project, including all rights of defendants whatsoever, and improvements thereon, subject, however, to existing rights of way for easements for any highway purposes, existing rights of way for telephone and telegraph lines, electric power lines, irrigation systems and ditches and subject to the outstanding rights, if any, under reservations and exceptions contained in the patents from the United States and the State of Montana, and subject to all reservations of minerals to plaintiff, the United States of America in patents issued.

And it further appearing to the Court that under date of April 27th, 1942, a Declaration of Taking was filed in the office of the Clerk of the above entitled Court, executed by Grover B. Hill, Assistant Secretary of Agriculture, and that there was deposited or paid into the registry of the Court, as the estimated compensation for the owners or owner thereof, or persons entitled thereto, for the taking of the said lands, the respective sums, to wit:



For tract 494 (embracing tracts 494-1, 494-2, 494-3, 494-4, 494-5, 494-6, 494-7, 494-8, 494-9, 494-10, 494-11, 494-12, 494-13, 494-14A and 494-14B) .....	\$23,526.00
For tract 511 (embracing tracts 511-1, 511-2, 511-3, 511-4, 511-5, 511-6 and 511-7).....	7,680.00
For tract 1-27.....	758.00
For tracts 1-47 and 1-53.....	425.00

and a Judgment was entered by the Court on the Declaration of Taking adjudging that title to the hereinabove described lands had vested in the United States of America. [77]

And it further appearing that the respective sums of money deposited in the registry of the Court as the estimated compensation for the taking of said lands, totaling \$32,389.00, lawful money of the United States of America, equals the total of the awards of compensation for the respective tracts, made by the commissioners and returned into Court,

It Is Ordered, Adjudged and Decreed That the respective sums so deposited in Court for the respective tracts of land constitute and are full, just compensation for the taking and acquiring of the property hereinabove described and that all title to the said property, subject to the reservations above set forth, in fee simple, is vested in the plaintiff, the United States of America.

Dated this the 5th day of December, 1945.

/s/ CHARLES N. PRAY,

United States District Judge.

[Endorsed]: Filed and entered Dec. 5, 1945.

Thereafter, on June 25, 1946, a Petition for Order Distributing Compensation deposited in registry of the Court was duly filed herein by Dawson County, Montana, in the words and figures following, to-wit: [79]

[Title of Court and Cause.]

PETITION FOR ORDER DISTRIBUTING  
COMPENSATION DEPOSITED IN REG-  
ISTRY OF THE COURT

To the Honorable Charles N. Pray, Judge of Said  
Court:

The petitioner, Dawson County, Montana, a body politic and corporate, respectfully represents:

I.

That said petitioner is one of the defendants in the above entitled cause;

II.

That on the date when the petition for condemnation, declaration of taking and entry of judgment thereon were filed in this cause, the said defendant, Dawson County, Montana, a body politic and corporate, was the record owner of the fee simple title to the real estate involved in said condemnation proceeding and designated as Tracts Nos. 494-1 to 494-14B, inclusive, as particularly described in the final judgment in condemnation in the aforesaid action.

III.

That a declaration of taking was heretofore filed in this cause on the 27th day of April, 1942, and,

at the time it was filed, as petitioner [80] is informed and believes, the sum of Twenty Three Thousand Five Hundred Twenty-six and no/100 Dollars (\$23,526.00) was deposited for the taking of Tracts Nos. 494-1 to 494-14B, inclusive, with the Clerk of this Court as the estimated just compensation for the taking of the above described land;

#### IV.

That the petitioner, Dawson County, a body politic and corporate, as defendant in said cause, contends that the sum so deposited is adequate and just compensation for the land so taken; that heretofore and on the 11th day of July, 1944, petitioner was paid from the said funds, the sum of Ten Thousand Six Hundred Twenty-eight and 57/100 Dollars (\$10,628.57), and the remainder of the compensation deposited in the registry of the Court on account of the taking of the said tracts remains impounded therein.

#### V.

That the petitioner, Dawson County, Montana, a body politic and corporate, is the sole defendant interested in said real estate as the owner thereof, and all of the other defendants are barred from asserting any right, title, claim, lien or interest in the said funds heretofore deposited in registry of the said Court under and by virtue of Chapter 100, Laws of the Twenty-eighth Legislative Assembly of the State of Montana, 1943; that the petitioner desires that the sum of Twelve Thousand Eight Hundred Ninety-seven and 43/100 Dollars (\$12,-

897.43), the balance of funds on hand in the registry of the Court, be disbursed by the Clerk of this Court to the said defendant, Dawson County, Montana, a body politic and corporate.

Wherefore, petitioner prays that an order be entered in this cause finding title in fee simple in said real estate to be in Dawson County, Montana, a body politic and corporate, and in no other person or persons, and finding that none of the other defendants in this case have any right, [81] title or interest in said real estate, and directing the Clerk of this Court to pay to the benefit of the petitioner, Dawson County, Montana, a body politic and corporate, the balance of funds on hand deposited in the registry of this Court as hereinabove set out.

E. W. POPHAM,

D. C. WARREN,

Attorneys for Defendant, Dawson County, Montana.

[Endorsed]: Filed June 25, 1946.



Thereafter, on October 21, 1946, a Petition for Distribution was filed herein by Mary Hagen, et al, in the words and figures following, to wit:

[Title of District Court and Cause.]

### PETITION FOR DISTRIBUTION

In accordance with the Answer, Counter Claim and Cross-Complaint filed herein and the briefs submitted, the defendants Mary Hagen, E. B. Clark, by their personal representatives and assignee and Minnie R. Evans, Albert Anderson and N. M. Coursolle, Minnie R. Evans, R. M. Smythe & Co. and all the bond holders of the Upper Glendive-Fallon Irrigation District who are benefitted by such proceedings and petition the court for an order distributing the proceeds of the condemnation deposited in the registry of the above-entitled court in the total sum of \$32,389.00 as follows:

1. That there be paid Dawson County, defendant, the sum of \$7313.51, and that said county be required to refund to the plaintiff and repay to the registry of said court the sum of \$3315.06 improperly withdrawn.
2. That there be paid defendant Prairie County the sum of \$2397.68 and that such county be required to refund to the plaintiff and repay to the registry of said court the sum of \$327.86, and
3. That the sum of \$22,677.81 be paid pro rata

to the defendant bond holders of said irrigation district after reasonable attorneys fees be deducted from said amount for Desmond J. O'Neil and P. F. Leonard who have appeared herein and by reason thereof said bondholders have benefitted.

DESMOND J. O'NEIL,  
P. F. LEONARD,  
Attorneys for Bondholders.

[Endorsed]: Filed Oct. 21, 1946.

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Thereafter, on October 23, 1946, a Stipulation as to value of Tract No. 494 was duly filed herein, being as follows, to wit:

[Title of District Court and Cause.]

### STIPULATION

It Is Hereby Stipulated and Agreed by and between the County of Dawson, State of Montana, acting by and through the Board of County Commissioners, and the United States that for all purposes of this condemnation proceeding the price and value of Tract No. 494, containing 4,164.69 acres, more particularly described in the petition filed herein, shall be the sum of \$23,526.00 and that the award of the Court, or any appraisers or com-

missioners appointed by the court in this proceeding, may be \$23,526.00.

Dated this 3rd day of September, 1941.

DAWSON COUNTY,  
STATE OF MONTANA,

By /s/ G. A. HICKS,  
Chairman, Board of County  
Commissioners.

/s/ F. E. BROWN,  
Member, Board of County  
Commissioners.

/s/ A. W. EDWARDS,  
Member, Board of County  
Commissioners.

[County Seal]

Attest:

/s/ L. T. ELLIOT,  
Clerk of the Board.

[Endorsed]: Filed Act. 23, 1946.

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Thereafter, on May 2, 1947, a certificate of L. T. Elliot as to title to lands through tax deed procedure was duly filed herein, in the words and figures following, to wit: [152]

[Title of District Court and Cause.]

CERTIFICATE AS TO LANDS INVOLVED  
AND DATES COUNTY TOOK TAX DEEDS

Office of the County Clerk and Recorder, L. T.  
Elliot, Clerk, Glendive, Montana.

State of Montana,  
County of Dawson—ss.

I hereby certify that Dawson County, State of Montana took title to the following described lands through tax deed procedure on the date set after the description.

	Sec.	
S1/2 .....	1-13-53	Dec. 11, 1939
S1/2SW1/4 frl. ....	10-13-53	Dec. 11, 1939
S1/2SE1/4 .....	10-13-53	Dec. 11, 1939
S1/2 .....	11-13-53	Dec. 11, 1939
Lots 2 and 3, NW1/4NW1/4.....	13-13-53	Dec. 11, 1939
All .....	21-13-53	Dec. 11, 1939
Lot 9 .....	23-13-53	Aug. 15, 1939
Lots 1, 2, 3, 4.....	12-13-53	Dec. 11, 1939
W1/2NE1/4, E1/2NW1/4 .....	12-13-53	Dec. 11, 1939
W1/2NW1/4 .....	12-13-53	Dec. 11, 1939
SW1/4 .....	12-13-53	Dec. 11, 1939
Lots 1, 2, 3, 4.....	12-13-53	Dec. 11, 1939
SW1/4 .....	14-13-53	Dec. 11, 1939
S1/2NE1/4, NW1/4NE1/4 .....	14-13-53	Dec. 11, 1939
N1/2SE1/4, Lot 3 .....	14-13-53	Aug. 15, 1939
NW1/4 .....	14-13-53	Dec. 11, 1939
All .....	15-13-53	Apr. 22, 1931
% Int. SW1/4 .....	16-13-53	Dec. 11, 1939
SE1/4NW1/4, South R. of W.....	16-13-53	Dec. 11, 1939
Lots 1 to 4, NW1/4NE1/4, N1/2NW1/4, SW1/4NW1/4 .....	22-13-53	Apr. 22, 1931
Lots 3 to 8 and 11 and 12, SE1/4NW1/4, NE1/4SW1/4 .....	6-13-54	Apr. 22, 1931
Lots 1, 2 and 13 .....	6-13-54	Dec. 11, 1939

Witness my hand and seal this 19th day of April  
A.D., 1947.

[Seal]

L. T. ELLIOT,  
Clerk and Recorder.

[Endorsed]: Filed May 2, 1947.



Thereafter, on September 4, 1947, the Decision of the Court was duly filed herein, being in the words and figures following, to wit: [154]

In the District Court of the United States in and  
for the District of Montana, Billings Division

Civil No. 348

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PAUL T. MARKEY, et. al.,

Defendants.

### DECISION AND ORDER OF THE COURT

The principal question involved in the above condemnation proceeding at this time relates to the distribution of compensation now on deposit in the registry of the court, which, upon proper showing, should be made to the persons entitled thereto.

The lands embraced in this action were acquired by the Government through an agreement which included total acreage of the purchase and consideration therefor, and also through condemnation proceedings, wherein declaration of taking was filed (sec. 258a, Title 40, U.S.C.A.), and commissioners were appointed by the court to appraise the lands, which was done in accordance with the terms of the aforesaid agreement of purchase; and thereafter they made their return and awarded as just compensation for the same total acreage the same

amount of money as had theretofore been agreed upon between the Government and the defendants herein, Dawson and Prairie Counties, which sum was thereafter deposited in the registry of the court. Final judgment was entered on the awards of the commissioners, and no appeal was ever taken therefrom.

The court thereafter ordered distribution from the registry to the defendant counties, Dawson and Prairie, and to each, upon representations made to the court, such sums as would equal the delinquent unpaid general taxes, on the lands embraced in the purchase and thereafter condemned.

Hearings have been held in respect to the alleged proper amounts due the counties, and the bondholders, and others listed [155] as being entitled to payment of certain sums from the court registry; voluminous briefs have been filed, following oral argument, together with several documents marked as exhibits.

Counsel claim for the bondholders the balance remaining in the registry of the court amounting to about the sum of \$19,034.89; also the sum of \$3,315.06, which they allege was improperly paid to Dawson County and the sum of \$327.86 as excess payment to Prairie County; also they claim the sum of \$758 on deposit in the registry as due on tract 1-27, known as the Yale tract, also the sum of \$425 as due them from the deposit in the registry to the credit of tracts Nos. 1-47 and 1-53, known as Scottish-American Mortgage Company tract.

From a consideration of the law and the facts

as they appear to the court the counties aforesaid were entitled to payment from the registry of such sums of money as represented the delinquent unpaid taxes on the lands condemned, in which the counties held title at the time such condemnation proceedings were begun. After such payment was made to the counties, a balance remained, and still remains, impounded in the registry of the court, subject to further order of distribution.

Of the separate tracts of land involved, the one known as the Henderson tract (No. 1-12) was not embraced in the irrigation district in question and was not subject to the lien of the bondholders.

As to the Yale tract, No. 1-27, it does not appear that it was susceptible of irrigation, was ever assessed for that purpose, or that it was obtained from either of the counties, or that the irrigation district or bondholders have any lien upon the compensation of \$758 deposited in the registry of the court to the credit of this piece of land.

The land designated as the Scottish-American Mortgage Co. tract, Nos. 1-47, and 1-53, for which \$425 was deposited in the registry, does not appear to have been legally embraced in the irrigation district in the absence of notice or consent, and that upon foreclosure in which the irrigation district was included as a party defendant, no claim of lien or otherwise [156] was made by such defendant. The irrigation district and the bondholders do not appear to have any interest in the distribution of this fund.

The superiority of general taxes assessed against

the lands in question over special assessments and lien of bondholders is indicated by the decision in *State ex rel Malott, et al., vs. Board of County Commissioners*, 89 Mont. 37, wherein it was held that when the county acquired lands by tax deed on account of delinquent taxes and irrigation district assessments, it takes and holds such title as a trustee. Other authorities apply to the state of facts presented here and hold that after the payments to the counties of general taxes, and to the other claimants listed, under the equity rule it would seem that the balance of the money remaining in the registry should be paid to the bondholders.

It appears that the irrigation district had ceased to function as such in the year 1927, and was therefore not functioning when tax title deeds were taken by the counties. It was also held that tax title deeds taken for lands in irrigation districts (taken prior to amendment of section 2215, Laws of 1937, Chapter 63, Sec. 1, p. 106) extinguished all liens and encumbrances against the lands. *State ex rel Malott vs. Cascade County, et al.*, 94 Mont. 394, 406; *Rosebud Land & Improvement Co. vs. Carterville Irrigation District, et. al.*, 102 Mont. 465.

The registry fund above described appears to be the only fund to which the bondholders may have recourse in this proceeding to apply on the bonded indebtedness of the district. Distribution to the bondholders apparently is required to be made on a pro rata basis. *State ex rel Central Auxiliary Corporation vs. Rorabeck, County Treasurer, et al.*, 111 Mont. 320. The legal rights to distribution



became fixed and are determinable as of the date the money was deposited in the registry of the court.

The claim by counsel for the bondholders that assessments made against personal property which became a lien on real estate are inferior in rank to assessments made for the purposes of the [157] irrigation district, seems to be clearly established to the contrary in the supplementary brief by the Government, wherein statutes and authorities are cited which, in the court's opinion, plainly declare the law on the facts presented here. The following concluding statement of counsel appears therein: "It will be noted that until Section 2215.9 was amended by enactment of the 1937 legislative session that assessments of an irrigation district were inferior to the general taxes. See Chapter 63, page 106, 1937 Session Laws. Record will disclose that no assessments were made by the irrigation district for the year of 1937 or subsequent thereto. Clearly, in the light of the law any taxes assessed against personal property for general purposes and became a lien upon the lands of the owner are superior to assessments made to pay interest on bonds, or other purposes in connection with the irrigation district, and this is substantially true by reason of there being no statute requiring that irrigation district be notified before taxes on personality of an owner would be permitted to become a lien against the lands superior to the lien of bondholders or assessments made for the irrigation district."

. It appears that the irrigation district was legally

organized and that the irrigable area subject to the lien of the bondholders was fixed and determined by the board of directors as provided by law, and that this was done prior to the making of assessments and the issuance of bonds. So far as can be ascertained from the record none of the land owners in the district ever paid any of these assessments or any part of the bonded indebtedness, and none of the lands designated by the board of directors as irrigable were ever irrigated. Section 7235, M.C. 1921, as amended by Chapter 147, Session Laws of 1923, p. 473.

Dawson County, Montana, offered to sell 4,164.69 acres of land to the Government for the consideration of \$23,526, and in this offer of sale there was no division of the lands to be sold into tracts. Here is the offer and agreement referred to: [158] "It is hereby stipulated and agreed by and between the County of Dawson, State of Montana, acting by and through the Board of County Commissioners, and the United States, that for all purposes of this condemnation proceeding the price and value of tract No. 494, containing 4,164.69 acres, more particularly described in the petition filed herein, shall be the sum of \$23,526.00 and that the award of the court, or any appraisers, or commissioners appointed by the court in this proceeding, may be \$23,526.00."

Counsel for the Government states that the lands were divided into tracts as shown by the complaint in order to determine who should be named as parties defendant and in what tracts or parcels of land

they might claim an interest, and in this connection counsel further stated: "The sums allocated to the respective tracts constituted a division of the compensation deposited in the registry of the court based upon appraisals made by representatives or agents of the United States, and was provided for me as attorney for the Government, by Harry C. Anderson, Project Manager of the Buffalo Rapids Project. The same statement applies as to the lands offered for sale to the Government by Prairie County, Montana, and particularly as to the allocation thereof to the respective tracts. So far as the writer knows, Dawson County, Montana, was not consulted at any time or at all as to the allocation of the compensation to the respective tracts of land. Assurance, however, was given to Mr. D. C. Warren, Attorney for Dawson County, Montana, that commissioners appointed would be requested to award a sum equal to the offer made and like assurance was given to the County Attorney of Prairie County, Montana, and awards were so made by the commissioners."

Where the purchase price of property has been agreed upon by the owner and the Government, and the latter should thereafter commence condemnation proceedings, the price agreed upon is still binding upon both parties. *Bank of Edenton v. U. S.* 251, 254; *Danforth v. U. S.* 308 U. S. 271, 282; *Oliver v. U. S.* 156 F(2), 281, 282. [159]

Counsel explains that the lands were condemned so as to avoid any question relating to title, and that an effort was made to name as defendants all per-

sons who might claim any interest in the lands or any part thereof.

The court has read the transcript of the hearings and the minutes of the irrigation district on the designation of irrigable areas and the levying of assessments thereon, that is, for the purposes of the irrigation district, and it would seem that the commissioners have fairly complied with the law in that respect.

The Counties of Dawson and Prairie had a first lien on the compensation deposited in the registry of the court to the extent of the general taxes delinquent and unpaid against the lands in question at the time the tax deeds were taken, and statements were furnished to the court of the amounts claimed to be due the counties respectively by reason of such delinquent and unpaid taxes at the time they applied to the court for distribution of the sum to which each county claimed to be entitled, and such payments were made accordingly. Counsel for the bondholders allege that an overpayment has been made by the court to Dawson County and also to Prairie County as hereinbefore set forth, and counsel for Dawson County claims that his client is entitled to all the money still remaining in the registry of the court.

No part of the Yale tract was designated as irrigable land and was therefore not subject to the lien of the bondholders, and the compensation deposited, after payment of any taxes that may be found delinquent, should be distributed to the former owners of said tract. As to the tract, 1-47 and 1-53, the



court is satisfied that the compensation therefor on deposit in the registry of the court should be distributed to the Scottish American Mortgage Co., Ltd., or its assignee. It seems doubtful whether any portion of this tract in Sec. 14 was ever properly included or properly designated as an irrigable area, and reference is made to consideration heretofore given this subject. [160]

In regard to the recent question propounded by the court to counsel on the subject of proper distribution of funds in the court registry only one brief has been received, and that one came from Mr. Leonard, who is entitled to commendation for his research, although the question was only partly answered; however, upon further consideration of the subject distribution will be made in the manner herein set forth.

Messrs. O'Neil and Leonard, representing the bondholders, have suggested to the court the propriety of allowing them compensation for legal services rendered the bondholders, intending that such allowance should be fixed by the court in a sum commensurate with the value thereof and be paid to them out of the registry of the court. It would appear that such services have inured to the benefit of the parties thus represented, but that no authority has been cited, and the court knows of none, which would authorize the payment of counsel fees as requested in a proceedings of this kind.

After consideration of the calculations submitted by Messrs. Leonard and O'Neil on the subject of overpayment from the registry of the court to the

counties, Dawson and Prairie, the court has come to the conclusion that counsel have accurately set forth the total amounts actually due the counties, and the exact amounts representing the overpayments made to the counties, which amounts will be added to the sum now remaining in the registry as due the bondholders, and the excess payments will be ordered returned by the counties to the registry of the court. The overpayment to Dawson County is the sum of \$3,315.06, and the overpayment to Prairie County is the sum of \$327.86.

The statement of facts in respect to overpayment to the counties appears on page 5 of counsel's brief, received June 21st, 1947, reading as follows. [161]

#### "Correction on Distribution

"As shown by the files the complaint divided the lands into twenty-four separate tracts with separate ownership and interests and the answer of Dawson County conformed thereto and said County made claim to said fourteen tracts and Prairie County made claim to seven tracts; the details in that respect are shown by the answers. Through error and nearly a year prior to the actual determination of the value of the separate tracts and in accordance with an advance estimate on each of said tracts on July 11, 1944, Dawson County was paid on tracts 494-1 to 494-14, the sum of \$10,628.57 and Prairie County was paid on tracts 511-1 to 511-7, \$2725.54, but when the commission finally made the award and the final judgment was entered

establishing the award the following errors were ascertained which are beyond dispute, to wit:

Dawson County		County was paid estimated tax
Tract 494-8	award.....\$ 680.50	\$ 695.58
Tract 494-11	award..... 995.00	2,348.94
Tract 494-13	award..... 606.90	2,552.94
Total .....		\$2,282.40
Hence, the county was overpaid		\$3,315.06
Prairie County		Paid estimated taxes
Tract 511-6	award.....\$ 890.00	\$1,217.86
Prairie County was overpaid on that tract		\$327.86

The mistake is evident and was easily made. There is no dispute as to the general taxes but the awards on the separate tracts in the tracts mentioned were less than the taxes. It is possible that the commissioners could have increased the awards but did not do so and hence under Section 258a it is proper, we submit, for the Court to enter a judgment against the United States for the additional sum of \$3642.92, representing the excess awards made to the Counties on the tracts above as the Counties got more than the awards which is clearly improper."

Counsel for the Government agrees that the figures on overpayment to the counties submitted by counsel for the bondholders is substantially correct and should be accepted by the court. Counsel for Dawson County has not filed any brief or made any showing in response to the recent request of the court relating [162] to the subject of distribution of the funds, but has taken issue with counsel for

the bondholders and the Government relating to overpayment to the counties, with which the court is unable to agree.

Accordingly it is ordered and this does order that the Counties, Dawson and Prairie, return forthwith to the registry of the court the respective amounts above set forth as overpayments, and in default thereof, the proper authorities of the Government will be so advised, in order that proceedings may be commenced for the recovery of such overpayments; and in the meantime, under Section 258a judgment for the additional sum of \$3642.92, representing the overpayments, will be ordered, and is hereby ordered, entered against the United States, and distribution of the funds in the registry of the court will be made according to the foregoing decision. Exceptions are allowed counsel.

CHARLES N. PRAY,  
Judge.

[Endorsed]: Filed Sept. 4, 1947. [163]



Thereafter, on October 25, 1947, a Notice of Appeal by Dawson County, Montana, was duly filed herein, as follows, to-wit: [164]

[Title of District Court and Cause.]

### NOTICE OF APPEAL

To United States of America, Plaintiff, and to Messrs. John B. Tansil and Charles W. Buntin, Its Attorneys in Fact, and to Messrs. P. F. Leonard and Desmond J. O'Neil, Attorneys for Certain Bondholders, and to the Clerk of the Above-Entitled Court:

You and each of you will please take notice that the defendant, Dawson County, Montana, a body politic and corporate, in the above-entitled action, by and through the undersigned, its attorneys, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the decision of the Court entered in the said action on September 4, 1947, and to parts thereof as follows:

#### I.

On page 9, paragraph II, beginning in Line 5 reading "It is ordered and this does order that the Counties of Dawson and Prairie return forthwith to the Registry of the Court the respective amounts above set forth as overpayments" being the sum of Three Thousand Three Hundred Fifteen and 06/100 Dollars (\$3,315.06) as to Dawson County and the sum of Three Hundred Twenty-Seven and 86/100 Dollars (\$327.86) as to Prairie County."

## II.

That part of the decision of the Court hereinbefore referred to on page 9 thereof, beginning at line 14 in paragraph II reading “and distribution of the funds in the Registry of the Court will be made according to the [165] foregoing decision” which judgment, order and decision distributed to the bondholders of the Upper Glendive-Fallon Irrigation District, a party defendant in said action, the sum of Sixteen Thousand Two Hundred Twelve and 49/100 Dollars (\$16,212.49), moneys due appellant herein.

Dated this 25th day of October, 1947.

/s/ D. C. WARREN,

/s/ E. W. POPHAM,

Attorneys for Defendants and Appellant Dawson  
County, Montana.

[Endorsed]: Filed Oct. 25, 1947. [166]

Thereafter, on October 25, 1947, Cost Bond on Appeal was duly filed herein, being as follows, to-wit: [169]

[Title of District Court and Cause.]

### COST BOND ON APPEAL

Know All Men by These Presents:

That we, Dawson County, Montana, a body politic and corporate, as Principal, and The National Surety Corporation, a corporation, as Surety, are held and firmly bound unto the United States of America in the full sum of Two Hundred Fifty Dollars (\$250.00) to be paid to said United States of America, to which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals this 25th day of October in the year of 1947.

Whereas, lately in the above-entitled action, a decision was rendered against the Defendant, Dawson County, Montana, therein and the said Defendant is about to appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the said decisions and order therein contained to reverse said judgment, order and decision.

Now, therefore, the condition of the above obligation is such that if the above-named Defendant shall pay all costs if the said appeal is dismissed or the judgment, order and decision affirmed or

shall pay such costs as the appellate court may award if the said judgment, order and decision is modified, then the above obligation to be void, otherwise to remain in full force and virtue. [170]

In accordance with Rule 90 of the Rules of the above-named Court of the United States, for the District of Montana, the said The National Surety Corporation, a surety herein, expressly agrees herein that in case of a breach of any conditions of this bond, that the above-named Court upon notice to the said surety of not less than ten days, may proceed summarily in the above-entitled action in which this bond is being given, to ascertain the amount which the said surety is bound to pay on account of such breach, and render judgment therefor against the said surety and award execution therefor.

[Seal]

DAWSON COUNTY,  
MONTANA,

A Body Politic and  
Corporate.

By /s/ A. W. EDWARDS,  
Chairman of Its Board of  
Commissioners.

[Seal]

THE NATIONAL SURETY  
CORPORATION,

By /s/ D. C. WARREN,  
Its Attorney in Fact.

[Endorsed]: Filed Oct. 25, 1947. [171]



Thereafter, on December 3, 1947, an Order was filed and entered herein, extending time for filing and docketing the Record on Appeal in the United States Circuit Court of Appeals, said Order being as follows, to-wit: [184]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE  
RECORD ON APPEAL AND DOCKET  
ACTION

For good cause appearing, it is ordered that the time for filing the record on appeal, and docketing the action in the United States Circuit Court of Appeals for the Ninth Circuit, in the above-entitled cause, be and hereby is extended to and including the 23rd day of January, A.D. 1948, said appeal being taken by Dawson County, Montana, from the decision and order of the Court awarding certain money now in the registry of the Court to the bondholders involved in the action.

Dated December 3, 1947.

CHARLES N. PRAY,  
United States District Judge for the District of  
Montana.

[Endorsed]: Filed and Entered December 3,  
1947. [185]

Thereafter, on December 4, 1947, Notice of Cross Appeal by Mary Hagen, et al, was duly filed herein, being as follows, to-wit: [186]

[Title of District Court and Cause.]

### NOTICE OF APPEAL, CROSS-APPEAL

Notice is hereby given that the defendants Mary Hagen and E. B. Clark and Minnie R. Evans, on their own behalf and on behalf of all bondholders of the Upper Glendive-Fallon Irrigation District, defendants herein, appeal to the Circuit Court of Appeals for the Ninth Circuit from the decision of the District Court herein rendered and entered on September 4, 1947, as to portions thereof as follows:

#### I.

From that portion thereof holding as follows:

“As to the Yale tract, No. 1-27, it does not appear that it was susceptible of irrigation, was ever assessed for that purpose, or that it was obtained from either of the counties, or that the irrigation district or bondholders have any lien upon the compensation of \$758 deposited in the registry of the court to the credit of this piece of land.

“The land designated as the Scottish American Mortgage Co. tract, Nos. 1-47, and 1-53, for which \$425. was deposited in the registry, does not appear to have been legally embraced in the irrigation district in the absence of notice

or consent, and that upon foreclosure in which the irrigation district was included as a party defendant, no claim of lien or otherwise was made by such defendant. The irrigation district and the bondholders do not appear to have any interest in the distribution of this fund." \* \* \* [187]

"No part of the Yale tract was designated as irrigable land and was therefore not subject to the lien of the bondholders, and the compensation deposited, after payment of any taxes that may be found delinquent, should be distributed to the former owners of said tract. As to the tract, 1-47 and 1-53, the court is satisfied that the compensation therefor on deposit in the registry of the court should be distributed to the Scottish American Mortgage Co., Ltd., or its assignee. It seems doubtful whether any portion of this tract in Sec. 14 was ever properly included or properly designated as an irrigable area, and reference is made to consideration heretofore given this subject."

## II.

From that portion thereof as follows:

"Messrs. O'Neil and Leonard, representing the bondholders, have suggested to the court the propriety of allowing them compensation for legal services rendered the bondholders, intending that such allowance should be fixed by the court in a sum commensurate with the

value thereof and be paid to them out of the registry of the court. It would appear that such services have inured to the benefit of the parties thus represented, but that no authority has been cited, and the court knows of none, which would authorize the payment of counsel fees as requested in a proceeding of this kind.”

That the court should have allowed reasonable attorneys fees against the funds to be distributed to all bondholders as they will receive the benefit of the defense maintained by the bondholders and should bear the reasonable expense and burdens thereof.

### III.

That the order or decision in this case should require payment of interest as follows: [188]

Interest should be charged to the United States from the time of deposit until the time of decision and interest should be charged on the judgment and on the moneys due on distribution from entry of judgment.

This is a cross-appeal by said appellees.

Dated this 18th day of November, 1947.

D. J. O'NEIL,  
P. F. LEONARD,

Attorneys for Said Defendants, Appellees and  
Cross-Appellants.

[Endorsed]: Filed Dec. 4, 1947. [189]



Thereafter, on December 4, 1947, Statement of Points under Cross Appeal was duly filed herein, being as follows, to-wit: [192]

[Title of District Court and Cause.]

STATEMENT OF POINTS UNDER CROSS  
APPEAL, RULE 75(D)

The points upon which the cross appellants intend to rely upon the appeal are:

I.

The District Court was unauthorized to exclude from the Upper Glendive-Fallon Irrigation District the Yale tract No. 1-27 and the Court, without authority, deprived the bondholders of their lien on said lands and their right to compensation thereby to the extent of \$758.00.

II.

The District Court was unauthorized to exclude from the Upper Glendive-Fallon Irrigation District the Scottish American Mortgage Co., Ltd., tract Nos. 1-47 and 1-53 and the Court, without authority, deprived the bondholders of their lien on said lands and their right to compensation thereby to the extent of \$425.00.

III.

That all bondholders have received the benefit of the defense presented and maintained by attorneys D. J. O'Neil and P. F. Leonard, and all bondholders should share in the reasonable expense of this litiga-

tion and a reasonable attorneys' fee should be allowed and charged against all bondholders.

IV.

That the United States should be charged with interest on the funds deposited until entry of judgment and from the time of entry of judgment interest should be charged on the [193] amount directed to be distributed either against the United States or Dawson County, the appellant.

Dated this 18th day of November, 1947.

D. J. O'NEIL

P. F. LEONARD,

Attorneys for said Defendants, Appellees and Cross Appellants.

[Endorsed]: Filed Dec. 4, 1947. [194]

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In the District Court of the United States in and  
for the District of Montana

CERTIFICATE OF CLERK TO TRANSCRIPT  
OF RECORD ON APPEAL

United States of America,  
District of Montana

I, H. H. Walker, Clerk of the United States District Court for the District of Montana, do hereby certify and return to The Honorable, The United States Circuit Court of Appeals for the Ninth

Circuit, that the foregoing volume consisting of 198 pages, numbered consecutively from 1 to 198 inclusive, constitutes a full true and correct transcript of all portions of the record in case number 348, United States of America vs. Paul T. Markey, et al, designated by the parties as the record on appeal therein, except item 12 in appellants' designation which was by the Court excluded from the record on appeal herein, and except items 1 and 2 in appellees' and cross-appellants' designation for additional portions of the record on appeal which are incorporated in this transcript on appeal by appellants' designation, and except items 4, 5, 8 and 9 in appellees' designation for additional portions of the record which are original exhibits, the said original exhibits being transmitted to the United States Circuit Court of Appeals pursuant to order of this Court dated December 22, 1947.

I further certify that the costs of the transcript on appeal herein amount to the sum of Thirty-four and 60/100ths Dollars, (\$34.60), the appellant having paid \$24.30 thereof, and the appellees and cross-appellants having paid \$10.30 thereof.

Witness my hand and the seal of said Court at Great Falls, Montana, this 22nd day of December, A. D. 1947.

H. H. WALKER,

Clerk, U. S. District Court,  
District of Montana.

By /s/ C. G. KEGEL,

Deputy Clerk. [198]

[Endorsed]: No. 11821. United States Circuit Court of Appeals for the Ninth Circuit. Dawson County, Montana, Appellant, vs. Mary Hagen, E. B. Clark and Minnie R. Evans, on their own behalf and on behalf of all bondholders of the Upper Glendive-Fallon Irrigation District of the State of Montana, and United States of America, Appellees, and Mary Hagen, E. B. Clark and Minnie R. Evans, on their own behalf and on behalf of all bondholders of the Upper Glendive-Fallon Irrigation District of the State of Montana, Appellants, vs. Edna Yale, Allen W. Yale and Ruby Yale, his wife and Ruth Petterson and Hans Petterson, her husband, The Scottish American Mortgage Company, Limited, United States of America, Dawson County and Prairie County, Appellees. Transcript of Record. Upon Appeals from the District Court of the United States for the District of Montana.

Filed December 29, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.



United States Circuit Court of Appeals  
for the Ninth Circuit

No. 11821

DAWSON COUNTY, MONTANA, a body  
political and corporate,

Appellant,

vs.

MARY HAGAN, et al,

Appellees.

STATEMENT OF POINTS ON WHICH AP-  
PELLANT INTENDS TO RELY ON THIS  
APPEAL AND DESIGNATION OF PARTS  
OF RECORD WHICH APPELLANT  
THINKS NECESSARY FOR CONSID-  
ERATION THEREOF

Appellant intends to rely on this appeal on the contentions that the District Court of the United States for the District of Montana, being the trial court below, erred:

1. In adopting the so-called "Equity Rule" in making distribution to the bondholders of the Upper Glendive-Fallon Irrigation District, for the reason that the said bondholders had no lien on the lands involved herein, title to the same having passed to Appellant by tax deeds, which under Montana law created a new title in Appellant, free and clear of all liens and encumbrances against the land. (Paragraph 2, Lines 16 to 24, inclusive, Page 3, Decision of the Court, filed September 4, 1947).

2. In finding an overpayment to Appellant (Page 8, Paragraph 1 of Page 9, Lines 1 to 4, inclusive, Decision of the Court, filed September 4, 1947), the same being in conflict with that part of the Court's decision set forth on Page 6, Paragraph 3, Lines 11 to 24, inclusive.
3. Distribution of the funds in the registry of the Court, as ordered in Paragraph 1, Page 9, Lines 5 to 16, inclusive, Decision of the Court filed September 4, 1947, is improper, being in fact a collateral attack on the tax title of Appellant to the lands, contrary to all of the provisions of Montana law relating to tax deed titles.

Exceptions to all of the foregoing were allowed counsel by the Court in its decision of September 4, 1947.

The points of law upon which Appellant intends to rely, stated in general terms, are as follows:

1. That Appellant by contract sold to the United States 4164.69 acres of land for an agreed consideration of \$23,526.00 by written stipulation entered into September 3, 1941, conforming to previous options, resolutions and agreements entered into prior thereto, possession being taken by the United States of said lands, and the present action being brought only for the purpose of quieting title. (Decision of the Court, filed September 4, 1947, Paragraph 2, Page 1, Lines 5 to 16, inclusive; Paragraph 2,

Page 4, Lines 31 to 34, inclusive; Page 5, Lines 1 to 8, inclusive, and Paragraph 2, Page 5, Lines 29 to 34, inclusive.)

2. Appellant was the owner in fee under tax deeds to the lands sold by it to the United States, none of which were subject to any liens of bondholders of the Upper Glendive-Fallon Irrigation District. (Answer of Dawson County, filed March 20, 1944; Declaration of Taking, filed March 23, 1940; Stipulation of Dawson County, filed October 23, 1946.)
3. Appellant had prior right to all of its general taxes of said 4164.69 acres for the full consideration thereof, as agreed upon by the United States and Dawson County, and not subject to division into tracts made by the Federal agencies for their convenience. (Decision of the Court, filed September 4, 1947, Paragraph 3, Page 6, Lines 11 to 24, inclusive, and Paragraph 1, Page 5, Lines 9 to 28, inclusive.)

Therefore, pursuant to Rule 19, Paragraph 6, Appellant designates for printing herein the following documents in the record as certified and filed, except in so far as there may be duplications therein of documents and papers:

1. Second amended complaint, filed March 27, 1944.
2. Answer of Dawson County, filed May 20, 1944.

3. Reply of Dawson County, filed May 20, 1944.
4. Order of Distribution, filed July 11, 1944.
5. Petition for Distribution of Dawson County, filed June 25, 1946.
6. Stipulation of Dawson County, filed October 23, 1946.
7. Decision of the Court, filed September 4, 1947.
8. Notice of Appeal, filed October 25, 1947.
9. Cost Bond on Appeal, filed October 25, 1947.
10. Statement of Points on which Appellant Intends to Rely, filed January 19, 1948.

Dated this 17th day of January, 1948.

/s/ D. C. WARREN,

/s/ E. W. POPHAM,

Attorneys for Appellant.

Service of a copy of the within Statement of Points on which Appellant intends to Rely on this Appeal and Designation of parts of Record which Appellant thinks necessary for consideration thereof, is hereby acknowledged this 17th day of January, 1948.

/s/ P. F. LEONARD,

/s/ DESMOND J. O'NEIL,

Attorney for Appellees,

Glendive, Montana.

[Endorsed]: Filed Jan. 19, 1948.



[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS AND DESIGNA-  
TION OF RESPONDENTS AND CROSS-  
APPELLANTS MARY HAGEN, ET AL.

I.

Respondents and cross-appellants adopt as their points on appeal, their statement of points under cross appeal and now appearing in the transcript.

II.

The said respondents and cross-appellants also designate for printing the following additional portions of the transcript not designated by the appellant:

1. Return and report of the Commissioners appointed in condemnation describing property and fixing compensation, filed October 1, 1945.
2. Statement dated April 19, 1947, showing lands involved and dates county took tax deeds.
3. Answer counter claim and cross complaint filed by Mary Hagen, E. B. Clark, Minnie R. Evans on their behalf and on behalf of all bondholders filed May 13, 1944.
4. Petition for distribution of bondholders filed October 21, 1946.
5. Final judgment in condemnation filed December 5, 1945.
6. Notice of cross appeal of Hagen, et al. filed December 4, 1947.

7. Bond on Cross appeal filed November . . , 1947.
8. Statement of points under Cross appeal filed December 4, 1947.

### III.

The respondents and cross appellants now respectfully request the above entitled Circuit Court of Appeals to consider on appeal as a part of the transcript and without printing the following original exhibits which cannot be easily printed and which would involve excessive expense in the printing or photographic copies thereof:

1. Two large statements with figures, marked Dawson County exhibit No. 1 (and Exhibit A) showing delinquent taxes and assessments and other details.
2. A large map of the Upper-Glendive Fallon Irrigation District and marked Exhibit No. 3.
3. Bondholders Exhibit No. 3, being a type-written record of about 42 pages duly certified by an Abstract Company and entitled Abstract of the Proceedings of the Establishment and Organization of the Upper Glendive-Fallon Irrigation District.

Dated this 22nd day of January, 1948.

/s/ D. J. O'NEIL,

/s/ P. F. LEONARD,

Attorneys for Respondents  
and Cross-Appellants.

[Endorsed]: Filed Jan. 27, 1948.

[Title of Circuit Court of Appeals and Cause.]

APPLICATION OF MARY HAGEN, ET AL.  
THAT CERTAIN EXHIBITS NEED NOT  
BE PRINTED

Come now the respondents and cross-appellants, Mary Hagen, et al., and respectfully petition the court for permission to have the court consider the following original exhibits as now appearing in the transcript on appeal and as certified to by the Clerk of the United States District Court for the District of Montana without printing such exhibits for the reason that Exhibit No. 1 consists of statements with figures which would be difficult to print and Exhibit No. 3 is a large map which the court would properly refer but it would be difficult and expensive to print or photograph and Bondholders Exhibit No. 3 is an bstract certified to by an Abstract Company and shows the establishment and organization and issuance of bonds of the Irrigation District in question and consists of about 42 pages and may be properly referred to as an abstract without re-printing. That respondents and cross-appellants have not furnished their counsel with funds for printing and the printing of said original exhibits would be unreasonably expensive and may be properly considered in the original form and request therefor is made accordingly.

Dated this 22nd day of January, 1948.

/s/ D. J. O'NEIL,

/s/ P. F. LEONARD,

Attorneys for Respondents  
and Cross Appellants.

[Affidavit of mailing attached.]

[Title of Circuit Court of Appeals and Cause.]

ORDER THAT CERTAIN EXHIBITS NEED  
NEED NOT BE PRINTED

On Consideration of the application, and good cause therefor appearing, It Is Ordered that Exhibits No. 1 and No. 3 and Bondholder's Exhibit No. 3, need not be printed in the transcript of record, but will be considered by the Court in their original form.

/s/ FRANCIS A. GARRECHT,  
Senior United States  
Circuit Judge.





No. 11821

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United States  
Court of Appeals

for the Ninth Circuit

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DAWSON COUNTY, MONTANA, and PRAIRIE  
COUNTY, MONTANA,

Appellants,

vs.

MARY HAGEN, E. B. CLARK, MINNIE R.  
EVANS and UNITED STATES OF AMERICA,

Appellees,

and

MARY HAGEN, E. B. CLARK, MINNIE R.  
EVANS,

Appellants,

vs.

EDNA YALE, ALLEN W. YALE, RUBY YALE,  
RUTH PETTERSON, HANS PETTERSON,  
SCOTTISH AMERICAN MORTGAGE COM-  
PANY, LIMITED, UNITED STATES OF  
AMERICA, DAWSON COUNTY, MONTANA,  
and PRAIRIE COUNTY, MONTANA,

Appellees.

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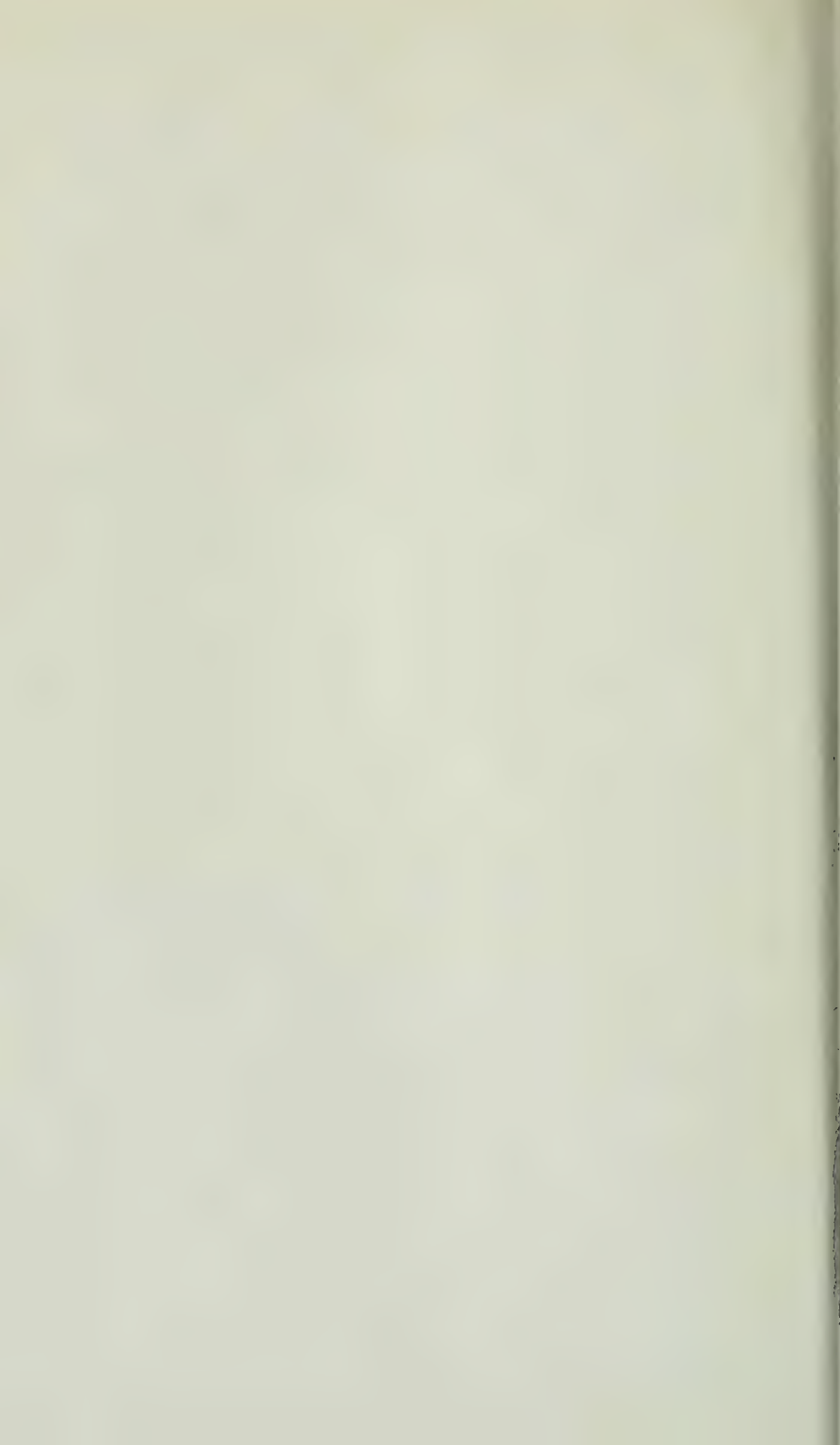
S U P P L E M E N T A L

Transcript of Record

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Appeals from the United States District Court

for the District of Montana PAUL P. O'BRIEN



No. 11821

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United States  
Court of Appeals

for the Ninth Circuit

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DAWSON COUNTY, MONTANA, and PRAIRIE  
COUNTY, MONTANA,

Appellants,

vs.

MARY HAGEN, E. B. CLARK, MINNIE R.  
EVANS and UNITED STATES OF AMERICA,

Appellees,

and

MARY HAGEN, E. B. CLARK, MINNIE R.  
EVANS,

Appellants,

vs.

EDNA YALE, ALLEN W. YALE, RUBY YALE,  
RUTH PETTERSON, HANS PETTERSON,  
SCOTTISH AMERICAN MORTGAGE COM-  
PANY, LIMITED, UNITED STATES OF  
AMERICA, DAWSON COUNTY, MONTANA,  
and PRAIRIE COUNTY, MONTANA,

Appellees.

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S U P P L E M E N T A L

Transcript of Record

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Appeals from the United States District Court  
for the District of Montana

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States Court of Appeals  
For the Ninth Circuit

No. 11,821

Nov. 1, 1948

DAWSON COUNTY, MONTANA,

Appellant,

vs.

MARY HAGEN, E. B. CLARK, MINNIE R.  
EVANS and UNITED STATES OF AMER-  
ICA,

Appellees.

MARY HAGEN, E. B. CLARK and MILLIE R.  
EVANS,

Appellants,

vs.

EDNA YALE, ALLEN W. YALE, RUBY YALE,  
RUTH PETTERSON, HANS PETTERSON,  
SCOTTISH AMERICAN MORTGAGE COM-  
PANY, LIMITED, UNITED STATES OF  
AMERICA and DAWSON COUNTY, MON-  
TANA,

Appellees.

Appeals from the United States District Court for  
the District of Montana.

Before Mathews, Bone and Orr, Circuit Judges.  
Per Curiam.

### OPINION

These appeals are from parts of a judgment entered on September 4, 1947, in a proceeding by the



United States against Dawson County, Montana, Mary Hagen, E. B. Clark, Minnie R. Evans, Edna Yale, Allen W. Yale, Ruby Yale, Ruth Petterson, Scottish American Mortgage Company, Limited, and others for the condemnation of land in Montana.

A complaint and two amended complaints were filed by the United States. Answers and petitions for distribution were filed by Dawson County, Mary Hagen, E. B. Clark and Minnie R. Evans. Issues of fact and of law were raised. On these issues, hearings were had and evidence was taken.

Before entering judgment, the District Court should have made findings of fact and should have stated conclusions of law. See §§9366, 9367 and 9954 of the Montana Revised Codes of 1935; Coffman v. Niece, 110 Mont. 541, 105 P. 2d 661; 40 U.S.C.A. §258; Rule 81(a) (7) of the Federal Rules of Civil Procedure. This was not done.

Therefore those portions of the judgment which are here appealed from are vacated, and the case is remanded to the District Court with directions to make findings of fact and state conclusions of law, as required by §§9366, 9367 and 9954 of the Montana Revised Codes of 1935, and thereupon enter such judgment as may be proper.

[Endorsed]: Per Curiam Opinion. Filed Nov. 1, 1948. Paul P. O'Brien, Clerk.

## NAMES AND ADDRESSES OF ATTORNEYS

D. C. WARREN,  
Glendive, Montana,  
E. W. POPHAM,  
Glendive, Montana,  
CECIL N. BROWN,  
Terry, Montana,  
Attorneys for Appellants, Dawson County,  
Montana, and Prairie County, Montana.

P. F. LEONARD,  
Miles City, Montana,  
DESMOND J. O'NEIL,  
Miles City, Montana,  
Attorneys for Appellees, Mary Hagen,  
et al.

JOHN B. TANSIL,  
United States District Attorney,  
Billings, Montana,  
Attorney for Appellee, United States of  
America. [1\*]

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\* Page numbering appearing at foot of page of original  
certified Transcript of Record.

In the District Court of the United States for the  
District of Montana, Billings Division

Civil No. 348

UNITED STATES OF AMERICA,

Plaintiff,

v.

PAUL T. MARKEY, ET AL,

Defendants,

MOTION TO ADOPT FINDINGS OF FACT  
AND CONCLUSIONS OF LAW.

Comes now the Defendants, Dawson and Prairie  
Counties, in the above entitled action and move  
the Court for an order adopting the attached Find-  
ings of Fact and Conclusions of Law.

/s/ D. C. WARREN,

/s/ E. W. POPHAM,

Attorneys for Dawson  
County, Montana.

/s/ CECIL N. BROWN,

Attorney for Prairie County,  
Montana.

FINDINGS OF FACT

The above entitled cause came on for hearing on  
December 13, 1946, at Billings, Montana, pursuant  
to the previous order of the Court, before the un-  
dersigned, one of the Judges of said Court, C. M.  
Buntin, Special Ass't United States Attorney, ap-  
pearing as "Amicus Curiae," D. C. Warren, At-  
torney for Dawson County and P. F. Leonard and  
Desmond J. O'Neil, Attorneys for Defendant Mary  
Hagen et al; bondholders were present:

Upon the evidence adduced, upon all of the records and files herein and after due consideration the Court finds the following: [2]

I.

That the United States of America, the plaintiff, a sovereign under authority of law acquired title to the lands described in its Declaration of Taking, filed April 27, 1942, under Section 258 A 40 USCA, to the lands described as follows:

Dawson County, Tract No. 494

Township 13 North, Range 53 East

Section 1 —S $\frac{1}{2}$ .

Section 10—S $\frac{1}{2}$ SW $\frac{1}{4}$ , S $\frac{1}{2}$ SE $\frac{1}{4}$ .

Section 11—S $\frac{1}{2}$ .

Section 12—NW $\frac{1}{4}$ , W $\frac{1}{2}$ NW $\frac{1}{4}$ , SW $\frac{1}{4}$ , Lots 1, 2, 3, 4.

Section 13—Lots 2 & 3, NW $\frac{1}{4}$ NW $\frac{1}{4}$ .

Section 14—Lots 1 & 2, N $\frac{1}{2}$ SW $\frac{1}{4}$ , Lot 3, S $\frac{1}{2}$ NE $\frac{1}{4}$ , NW $\frac{1}{4}$ NW $\frac{1}{4}$ , N $\frac{1}{2}$ SE $\frac{1}{4}$ , NW $\frac{1}{4}$ .

Section 15—All.

Section 16—SW $\frac{1}{4}$ , That part of the SE $\frac{1}{4}$ NW $\frac{1}{4}$  lying Southeast of U. S. Highway No. 10, and more particularly described as follows: Beginning at the Southeast corner of the SE $\frac{1}{4}$ NW $\frac{1}{4}$ , Thence West along the South line of said SE $\frac{1}{4}$  NW $\frac{1}{4}$ , a distance of 1320 feet, thence North along the West line of said SE $\frac{1}{4}$ NW $\frac{1}{4}$ , a distance of 931.5 feet to the South line of U. S. Highway No. 10, thence North 67°14' East along the South line of said highway a distance of 919.9 feet to its intersection with the North line of said SE $\frac{1}{4}$ NW $\frac{1}{4}$ , thence East along



the North line of said  $SE\frac{1}{4}NW\frac{1}{4}$ , a distance of 438.5 feet, thence South along the East line of said  $SE\frac{1}{4}NW\frac{1}{4}$ , a distance of 1320 feet to the point of beginning, containing 35.85 acres, more or less.

Section 21—All fractional section.

Section 22—Lots 1, 2, 3, 4,  $NW\frac{1}{4}NE\frac{1}{4}$ ;  $N\frac{1}{2}NW\frac{1}{4}$ ;  $SW\frac{1}{4}NW\frac{1}{4}$ .

Section 23—Lot 8.

Township 13 North, Range 54 East

Section 6—Lots 1, 2, 3, 4, 5, 6, 7, 8, 11, 12, 13,  $SE\frac{1}{4}NW\frac{1}{4}$ ,  $NE\frac{1}{4}SW\frac{1}{4}$ , Containing 4,164.69 acres.

Prairie County, Tract No. 511

Township 13 North, Range 53 East

Section 20— $N\frac{1}{2}NE\frac{1}{4}$ ,  $W\frac{1}{2}SW\frac{1}{4}$ ,  $E\frac{1}{2}SW\frac{1}{4}$ ,  $SE\frac{1}{4}$ ,  $S\frac{1}{2}NE\frac{1}{4}$ .

Section 28—Lots 1 and 2.

Section 29—Lots 2, 3, 4,  $NW\frac{1}{4}$ ,  $N\frac{1}{2}NE\frac{1}{4}$ ,  $NW\frac{1}{4}SW\frac{1}{4}$ .

Section 30— $SE\frac{1}{4}SE\frac{1}{4}$ , Lots 3 and 4,  $NE\frac{1}{4}$ ,  $N\frac{1}{2}SE\frac{1}{4}$ .

Containing 1,309.60 acres.

Robert Henderson Estate, Tract No. 1-12

Township 13 North, Range 53 East

Section 30—Lots 1 and 2, and  $E\frac{1}{2}NW\frac{1}{4}$  Containing 158.60 acres.

Edna Yale, Tract No. 1-27

Township 13 North, Range 53 East [3]

Section 16—That portion of the  $NW\frac{1}{4}$  lying northerly of the following described line: Beginning at a point on the west line of said Section 16

which point lies south 2262.5 feet from the NW corner of said Section 16, thence N.  $67^{\circ}14'$  E, a distance of 2863 feet to a point on the east line of said NW $\frac{1}{4}$  which point lies south 1154.5 feet from the NE corner of the NW $\frac{1}{4}$  of Section 16.

Containing 103.55 acres.

Scottish American Mortgage Company, Limited,  
Tracts Nos. 1-47 & 1-53

Township 13 North, Range 53 East

Section 14—Lot 4 and the NE $\frac{1}{4}$ NE $\frac{1}{4}$  Containing 51.77 acres.

By agreements with the Counties the total acreage of the purchase and the consideration therefor, and also through condemnation proceedings in this cause, wherein commissioners were appointed by the Court to appraise the lands, which was done in accordance with the terms of the aforesaid agreement of purchase; and thereafter they made their return and awarded just compensation for the same total acreage the same amount of money as had theretofore been agreed upon between the Government and the Defendant Counties, which sum was deposited in the registry of the Court.

## II.

That the Defendant, Upper Glendive Fallon Irrigation District was created under the Laws of Montana in December, 1921, embracing the lands described in the Declaration of Taking, as Tracts 494 and 511, and thereafter took proceedings under the Laws of Montana, to issue Irrigation Bonds in a total sum of One Hundred Fifty Thousand and

00/100 (\$150,000.00) Dollars, for the general purposes of said District; the bond issue being confirmed by Order of Court on December 2, 1922, and thereafter bonds in the principal amount of Eighty One Thousand Five Hundred and 00/100 (\$81,500.00) Dollars were sold to the public, none of which have been paid as to principal and interest thereon unpaid since January 1, 1928. [4]

#### IV.

That the Commissioners of said District took legal action to determine the area in each forty (40) acre tract in said District, subject to assessment for irrigation taxes and after said determination levied taxes in the years 1922, 1923 and 1924, for organization and other authorized purposes.

#### V.

That thereafter taxes were levied for Irrigation District Purposes in the years 1925 to 1938 by order of the Public Service Commission of Montana.

#### VI.

That the lands involved herein were duly assessed for taxes by the proper officers of Dawson and Prairie Counties in each year from 1923 to 1939 and taxes thereon not having been paid the Defendant counties by due and legal proceedings obtained title to the said lands by tax deeds and thereby the said defendants, Dawson and Prairie Counties, become the owners of said real estate, free and clear of any and all encumbrance.

## VII.

That thereafter the Counties of Dawson and Prairie, Montana, by agreement sold said lands described in the Declaration of Taking, Paragraph I hereof owned by them, at the consideration set forth therein, as just compensation to-wit:

Dawson County Tract 494, \$23,526.00

Prairie County Tract 511, \$7,680.00

and stipulations fixing said values for said lands were duly executed by the proper authorities of said Counties on September 3, 1941, and filed herein on October 23, 1946.

## VIII.

That orders for Distribution were made thereon on July 11, 1944, distributing to each of said Counties the amount of money representing the general taxes being the sum of Ten Thousand [5] Six Hundred Twenty-Eight and 57/100 (\$10,628.57) Dollars, to Dawson County and the sum of Twenty-Seven Hundred Twenty-Five and 54/100 (\$2725.54) Dollars to Prairie County, leaving a balance in the registry of the Court for further distribution in the sum of Nineteen Thousand Thirty-Four and 89/100 (\$19,034.89) Dollars.

## IX.

That Tract No. 1-27, the Yale lands, and Tract No. 1-47 and 1-53 for which the sums of \$758.00 and \$425.00, respectively, were deposited in the registry of the Court are not susceptible of irrigation, were never assessed for that purpose or that title to said tracts was not obtained from the Counties or that the irrigation District or the bondhold-



ers have any lien upon the compensation deposited in the registry of the Court as to these tracts of land.

### X.

That the irrigation district was legally organized and that the irrigable area subject to the lien of the bondholders was fixed and the board of directors as provided by one prior to the making of assessments and the issuance of bonds. So far as can be ascertained from the record none of the land owners in the district ever paid any of these assessments or any part of the bonded indebtedness, and none of the lands designated by the board of directors as irrigable were ever irrigated. Section 7235, M.C. 1921, as amended by Chapter 147, Session Laws of 1923, P. 473.

### XI.

From the foregoing Findings of Fact the Court makes the following,

### CONCLUSIONS OF LAW

1. That the Defendants, Dawson and Prairie Counties sold to the Government for the consideration fixed in the Declaration of Taking, filed herein, Tracts 494 and 511, respectively, [6] owned by them under tax deed proceedings wherein said Counties became the owners of said tracts of real estate free and clear of any encumbrance, and that the purchase price having been agreed upon by the owners and the Government and the latter having acquired

title thereto in this condemnation action, the price agreed upon is binding upon both parties. Bank v. Edenton (4 Cir.) 152 Fed. (2) 251-4.

2. That the sum in the registry of the Court be distributed as follows:

a. To Dawson County the sum of Twelve Thousand Eight Hundred Ninety-Seven and 43/100 (\$12,897.43) Dollars, balance of consideration agreed upon by the said County and United States of America.

b. To Prairie County, Montana, the sum of Four Thousand Nine Hundred Fifty-Four and 46/100 (\$4954.46) Dollars, balance of consideration due said County by agreement between it and United States of America.

c. The sum of Seven Hundred Fifty-Eight and 00/100 (\$758.00) Dollars to the Yale heirs covering Tract 1-27.

d. The sum of Four Hundred Twenty-Five and 00/100 (\$425.00) Dollars to the Scottish American Mortgage Company, being the just compensation awarded for Tracts 1-47 and 1-53.

Let judgment be entered accordingly.

.....  
District Judge.

[Endorsed]: Lodged in Clerk's office Nov. 24, 1948. [7]

[Title of District Court and Cause.]

Pursuant to the order of the Circuit Court of Appeals the Court now makes Findings of Fact and Conclusions of Law which were not requested by any party in the case.

After considering the evidence and the admitted facts the Court makes its Findings of Fact and Conclusions of Law as follows:

### FINDINGS OF FACT

1. The plaintiffs, in pursuance of the Act of February 25, 1931, (48 Stat. 1421) (40 U.S.C.A. 258a) and Acts supplementary and amendatory did on April 27, 1942, file in this action a declaration of taking and did take immediate possession of the lands involved and thereupon deposited in the registry of this Court the sum of \$34,489.00 and a complaint whereby the Secretary of Agriculture was alleged to have acted pursuant to the Act of October 14, 1940, (54 Stat. 1119) and the Act of August 1, 1888 (24 Stat. 357) did seek to procure 5788.21 acres of land in Prairie and Dawson Counties, Montana, for Governmental public purposes in the construction, operation and maintenance of a project to reclaim and irrigate said lands alleged to be arid and semi-arid and nearly all of said lands were within and a part of the Upper Glendive-Fallon Irrigation District which had been duly created as a public corporation on December 20, 1920, and which has never been dissolved, and an amended complaint in condemnation was filed by the Government [8] on March 27, 1944, wherein all known bondholders of said irrigation district were

2. On May 13, 1944, an Answer, Counter Claim and Cross-Claim was filed by Mary Hagen, E. B. Clark and Minnie Evans on their own behalf as bondholders of said irrigation district and on behalf of all of the other bond holders of said district and on behalf of all defendants similarly situated and having a common interest and a list showing the names and addresses of said bondholders and the amounts held were made a part thereof and the bondholders thereby petitioned that the compensation deposited with the Court be paid to all bondholders in preference to the claim of any other defendant and on May 20, 1944, defendant Dawson County filed Answer and claimed that it had acquired title by tax deed to the tracts of land described in the amended complaint as Tracts 494-1 to 494-14 and petitioned the Court to make distribution to said County of the compensation deposited for said tracts in the sum of \$23,526.00, and defendant Prairie County filed Answer and claimed the right to and distribution of \$7680.00 of the compensation deposited for tracts 511-1 to 511-7 and described in said amended complaint. Dawson County filed a reply on May 20, 1944, denying the answer, counter-claim and cross-claim of the bondholders.

3. The allegations of the Governments amended complaint were admitted by the defendants appearing and no issue was raised thereto. The defendants Dawson and Prairie Counties disclosed in their answers and by separate statements the amount of general taxes levied and assessed against the lands sought to be condemned and unpaid at the time the



also disclosed the amount of the special assessments which were levied and assessed against said lands at the time the said tax deeds were issued to said Counties, and on the petitions filed by said Counties [9] separate orders were entered on July 11, 1944, whereby in Dawson County on Tracts 494-1 to 494-14 excepting 494-14a it was determined that the general taxes due said County at the time of taking tax deed were \$10,628.57 and that there were due at that time delinquent unpaid assessments levied and assessed for said irrigation district in the sum of \$41,662.98 but that Dawson County had a first and superior lien against said lands at the time tax deeds were issued and was entitled to be paid such general taxes in the sum of \$10,628.57 and payment was directed and made accordingly from said deposit and by separate order it was also determined, held and entered that Prairie County was entitled to its said general taxes at the time it took tax deeds on tracts 511-1 to 511-7 in the sum of \$2725.54 and that the delinquent, unpaid assessments made and unpaid and which were levied for said irrigation district by said County amounted to \$9343.12 but that the said County was entitled to be paid as a prior right the said sum for general taxes amounting to \$2725.54 and which was paid from said compensation on deposit.

4. Thereafter Commissioners were appointed to appraise the property and to fix the compensation to be paid for each tract of land and they appraised each tract of land separately and fixed the compen-

sation of which notice was given to the parties who had appeared which return of the Commissioners was filed and entered October 1, 1945, and on December 5, 1945, a final judgment in condemnation was filed and entered which conformed to the amended complaint and the report of the Commissioners and compensation was separately fixed as to each separate tract of land as described in the decree and in the report of the Commissioners and in the complaint. Tract No. 1-12 was not embraced in the report of the commissioners or in the final judgment in condemnation but said Tract was purchased direct by the Government from the Executor of the Will [10] of Robert Henderson, Deceased.

The principal or only question for the Court to determine, as submitted by the parties in the condemnation proceeding, related to the disposition of the compensation deposited by the Government in the registry of the Court and involved questions of law rather than questions of fact.

No question arose in the case regarding the creation or organization of the Irrigation District and the proceedings involving the irrigation district were introduced by bondholders original Exhibit No. 3 and by the map or plat of the District Exhibit No. 3 which showed the location and boundaries and the two lifts or elevations required. The bonds in question were issued by the District and authorized by judgment of the District Court confirming the issue for the purpose of providing funds for the construction of irrigation works for said district and included the purchase of a pump-

ing plant and certain coal lands all in accordance with the plan of reclamation for the district and approved by the Public Service Commission of the State of Montana. No question has arisen regarding the validity of the general taxes which were assessed against the lands or regarding the validity of the special improvement assessments which were also levied and assessed against the lands and the general taxes and the levy thereof and the assessments and the levy thereof constituted the basis on which the tax deeds were issued and said tax deeds merged the general taxes and the special assessments. \$150,000.00 in bonds were authorized but only \$81,500.00 in bonds were sold or issued. The bondholders have taken no appeal from the order allowing the County of Dawson and the County of Prairie payment of general taxes and no contention was made in the final hearing in regard to that question and the Court considered from the statements made of the parties that that question was agreed to.

5. Many hearings were held before the Court and some [11] testimony taken but the principal question involved the question of law as to the right to compensation. A pre-trial conference was held and the parties presented to the Court statement of fact and many briefs were filed including briefs by Government Special Counsel on the questions of law and it was determined after consideration of all of such matters and the admitted facts that there was no deposit with the Register of the Court excluding the Henderson tract the sum of \$19,034.89

being the amount that remained after the payment of the general taxes to Dawson County and to Prairie County but a mistake was made in the orders made on July 11, 1944, which mistake is evident and was easily made and was due to the fact that the compensation or award was made more than a year after the orders for the payment of general taxes and of necessity the payment of taxes cannot exceed the total award made. A statement thereof is as follows:

Award as Determined by the Commissioners Report  
and the Judgment of Condemnation

Dawson County,

Tract No. 494-8 full compensation.....	\$ 680.50
Tract No. 494-11 full compensation.....	995.00
Tract No. 494-13 full compensation.....	606.90
Total awards and compensation paid.....	\$2282.40

Under the order of July 11, 1944, Dawson County was actually paid the following amount as the estimated general taxes due the County:

Tract No. 494-8 taxes paid.....	\$ 695.58
Tract No. 494-11 taxes paid.....	2348.94
Tract No. 494-13 taxes paid.....	2552.94
Total taxes paid .....	\$5597.46

Hence it is evident that Dawson County was over paid on said tracts the sum of \$3,315.06. That was the total amount over and above the total award and the general taxes paid to the County could not exceed the total award. [12]

Prairie County:

Tract No. 511-6 Total award and Compensation paid .....	\$ 890.00
Total taxes paid by Order of July 11, 1944.	1217.86



Thus Prairie County was over paid on said tract the sum of \$327.86 which to that extent was more than the total award and compensation and in all cases mentioned the mistake was evident and should be corrected. In computing the amounts of excess payment Special Counsel for the Government agreed that the figures on over-payment to the Counties submitted by the bondholders were substantially correct and should be accepted by the Court.

5. That no appeal was taken from the creation of the irrigation district involved and no appeal was taken from the order of confirmation on the issuance of the bonds of said district and under the laws governing the creation of the district and the establishing of the boundaries thereof and the validity of the bonds have now passed beyond question and cannot be re-litigated at this time.

6. That all of the bonds issued by said irrigation district were dated January 1, 1923, and were redeemable at the option of said district on the 1st day of January of any year after 20 years from the date thereof and draw interest from the date until paid at the rate of 6% per annum payable semi-annually on the first days of January and July of each year. That said bonds were negotiable instruments and negotiated and sold under the direction of the Commissioners of said irrigation district in accordance with the laws of Montana, and the Board of Public Service Commission of the State of Montana, attached to each bond a certificate that said bond was issued in accordance with

the laws of the State of Montana and that each of said bonds was duly registered in the office of the County Treasurer of Dawson County, Montana and they were sold and negotiated for cash and delivered to the County Treasurer of Dawson County, Montana, who delivered the same to the purchasers upon receipt of the purchase [13] money and that all of said bonds were sold in good faith to the purchasers and they are innocent holders thereof free and clear of any claims that might be made by said district.

7. Pursuant to law and according to their duty the Commissioners of the irrigation district did each year provide for an annual levy and collection of the special tax and assessment upon all of the lands included in the district which would have been sufficient if said levy and collection had been continued to pay said bonds and interest. That all of the bonds listed in the cross-claim and counter-claim are due, owing and unpaid and bear interest at the rate of 6% per annum from January 7, 1927.

8. Subsequent to the issuance of said bonds the defendants, Dawson County and Prairie County, took proceedings to acquire tax title to said lands but the levies made and the tax proceedings were had for the protection of both the general taxes and the special improvement taxes and the amounts due at the time of the issuance of the tax deeds and the basis therefor were the general taxes and the special assessments and the amounts of the general taxes and the amounts of the special assessments on which

tax deeds were issued are set forth in the answer filed by the defendant, Dawson County.

That insofar as Dawson County is concerned all of the lands within the irrigation district were taken by tax deed on December 11, 1939. That the dates different therefrom as shown by the certificate of the County Clerk and Recorder do not involve lands within the irrigation district.

9. That after the County had obtained tax deeds to the lands in Dawson County and in said irrigation district the Board of County Commissioners passed a resolution for the sale of said lands at market value thereof but the sale to be subject to the lien of the unpaid balance of the bonds issued by the Upper Glendive-Fallon Irrigation District on January 1, 1923, and [14] the notice of sale issued by the County Clerk thereon contained the same provision.

10. As to the Yale Tract No. 1-27 the Court considered that the land was never susceptible to irrigation from the irrigation district in question and was never assessed for that purpose. However, the tract was included within the boundaries of the irrigation district and was never excluded or withdrawn therefrom. It is also noted that Fred Yale the owner of the property was one of the petitioners who signed the petition for the issuance of the bonds in question and he as president of the district presented the resolution for the issuance of the bonds and signed the bonds.

11. As to the plat known as Nos. 1-47 and 1-53, The Scottish American Mortgage Company tract,

the land involved was within the boundaries of the irrigation district and Mary E. Lewis was the owner of the property according to the last assessment rolls of Dawson County at the time the district was created. She appeared through her attorney at the hearing but notwithstanding her objections the Court created the district based on the evidence including the report of the State Engineer and then adjudged that the lands were susceptible of irrigation from the same general source and the same system and included the land within the district. No appeal was perfected from said judgment.

12. It appears from the evidence that Dawson County did have negotiations with the Government for the sale of the land in question but the County was unable to deliver satisfactory title to the Government and hence the condemnation proceedings resulted. The negotiations for the sale of the said land from the County to the Government thereupon terminated.

13. In regard to the attorneys fees claimed by Messrs. O'Neil and Leonard, representing the bondholders, the Court does not find that the bondholders other than those specially [15] employing said attorneys have authorized payment of the counsel fee. It is true that the said attorneys have expended much labor and considerable expense on behalf of the bondholders which will inure if compensation be avoided from the money on deposit to the benefit of all bondholders, but the express authority of employment is not shown as to all of the bondholders.



## CONCLUSIONS OF LAW

Wherefore, the Court concludes,

1. The lien of general taxes due said Counties at the time tax deeds were taken were superior to the lien of the special assessments of said irrigation district and the liens of said bondholders under said district but in taking tax deeds the Counties acted for the benefit of the public agencies represented and benefited through the tax levies made in the tax proceedings in question and the Counties took and held tax deeds as trustees for the benefit of said District as well as for general taxes and the Counties having been paid the general taxes under the compensation deposited in the Court, therefore under the law and well-founded principles of equity all the balance of the money except as herein provided now on deposit in the Registry of this Court should be paid to the bondholders under the rule announced in:

State ex rel Malott, et al vs. Board of County Commissioners, 89 Mont. 37 and  
Toole County Irrigation District vs. Moody,  
125 F (2) 498.

2. The Court further concludes that Dawson County and Prairie County had no power excepting that conferred by law. They are not municipal corporations and are pure creatures of the State and subject to legislative control and as such have no constitutional restrictions against enactments by the legislature.

Franske vs. Fergus County, 76 Mont. 150.

Yellowstone Packing Co., vs. Hayes, 83 Mont.

1.

State vs. Holmes, 100 Mont. 256.

Hence the Court concludes that the Legislature of Montana could, as to the said Counties, waive its tax priority and did so by Chapter 63 of the Laws of 1937 amending Section 2215.9 of the Montana Code whereby it protected the lien of the irrigation assessments levied and payable subsequent to the tax deed. Here the bondholders have the right to require assessments to pay the principal and interest of the bonds even after the issuance of the tax deeds. Such right, of course, was subject to the prior law of condemnation. [17]

3. Distribution ordered to be made to the bondholders herein is required to be made on a pro-rata basis.

State ex rel Central Auxiliary Corporation vs.

Rorobeck, County Treasurer et al, 111 Mont.

320.

4. The Court also concludes that the bondholders of said irrigation district are not entitled to any lien on the two tracts known as the Yale Tract No. 1-27 on which the compensation awarded was \$758.00 nor any lien on the Scottish American Tract Nos. 1-47 and 1-53 for \$425.00 and said bondholders are not entitled to compensation on said tracts.

5. The Court also concludes that the compensation paid on July 11, 1944, to Dawson County on Tracts 494-8, 494-11 and 494-13 whereby the said

County was over-paid the sum of \$3315.06 was made by mistake on petition of said County and with the knowledge and without the objection of the Government and the compensation paid thereby reduced the amount deposited with the Registry of the *Clerk* and made by the Government to the extent of the over-payment.

And the compensation paid on July 11, 1944, to Prairie County on Tract 511-6 whereby said County was over-paid \$327.86 was made by mistake on petition of said County and with the knowledge and without objection of the Government and the payment thereby reduced the amount deposited by the Government.

The Court therefore concludes that Dawson County should be ordered to forthwith return to the Registry of this Court the sum of \$3315.06 bearing legal interest from July 11, 1944, until paid. That Prairie County should be ordered to forthwith return to the Registry of this Court the sum of \$327.86 and legal interest from July 11, 1944, until paid, and the compensation awarded to that extent not being on deposit since July 11, 1944, it is proper, under Section 258-a, 40 U.S.C.A. that judgment be entered against the United States for the sum of \$3642.92 with interest at 6% per annum from July 11, [18] 1944, in favor of the defendant bondholders.

United States vs. Miller, 317 U. S. 369, 63 S.  
Ct. 276 87 L. ed. 336, 147 A.L.R. 55.

Dated this 24th day of November, 1948.

/s/ CHARLES N. PRAY,  
Judge.

[Endorsed]: Filed Nov. 24, 1948.

[19]

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In the United States of America, United States  
District Court, District of Montana, Billings  
Division.

No. 348

THE UNITED STATES OF AMERICA,  
Plaintiff,  
vs.

PAUL T. MARKEY, et al,  
Defendants.

### JUDGMENT

The Court having made Findings of Fact and  
Conclusions of Law,

Now, Therefore, It Is Hereby Ordered, Adjudged  
and Decreed:

That defendants, Dawson County and Prairie  
County, were each paid under orders entered July  
11, 1944, the full payment of general taxes and  
neither of said counties have any further claim on  
any compensation awarded or on deposit herein.

That the sum of \$758.00 awarded on the Yale  
Tract No. 1-27 is ordered, adjudged and decreed  
paid to Edna Yale, Alan W. Yale and Ruby Yale,  
his wife and Ruth Pettersen and Hans K. Petter-  
sen, her husband, and



That the sum of \$425.00 awarded on Tracts Nos. 1-47 and 1-53 be paid to the Scottish American Mortgage Company or its successors or assigns and

That the sum of \$17,851.89, being the balance remaining on deposit with the Registry of this Court, be paid pro-rata to the defendant bondholders of the Upper Glendive-Fallon Irrigation District.

It Is Further Ordered, Adjudged and Decreed that Dawson County, Montana, forthwith return and pay to the Registry of this Court the sum of \$3315.06 with interest thereon at 6% per annum from July 11, 1944, until paid, and that Prairie County, Montana, forthwith return and pay to the Registry of this Court the sum of \$327.86 with interest thereon at the rate of 6% per annum from July 11, 1944, until paid, and in default thereof [20] the United States Government may proceed against said Counties to recover such respective amounts.

That the defendant bondholders are awarded judgment against the United States for the further sum of \$3642.92 with interest thereon at the rate of 6% per annum from July 11, 1944, until paid, which amount should be paid into the Registry of this Court for the excess payments paid to said Counties and which money shall be paid said bondholders pro-rata.

It Is Further Ordered, Adjudged and Decreed that Messrs. O'Neil and Leonard are denied attorneys' fees as against the compensation or funds

on deposit or to be deposited with the Registry of this Court excepting only as to those bondholders expressly represented by them.

Done in open Court this 24th day of November, 1948.

/s/ CHARLES N. PRAY,  
Judge.

[Endorsed]: Filed November 24, 1948. [21]

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[Title of Court and Cause.]

Clerk's Docket Entry showing findings of fact and conclusions of law made by Court and judgment entered pursuant thereto filed November 24, 1948:

Nov. 24, 1948—Filed Findings of Fact and Conclusions of Law as adopted by the Court.

Nov. 24, 1948—Filed and Entered Judgment of the Court pursuant to its Findings and Conclusions.

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[Title of District Court and Cause.]

#### NOTICE OF APPEAL

To: United States of America, Plaintiff, and to Messrs. John B. Tansil and Joseph F. Meglen, Its Attorneys, and to Messrs. P. F. Leonard and Desmond J. O'Neil, Attorneys for Certain Bondholders, and to the Clerk of the Above Entitled Court:

You, and each of you, will please take notice that the defendants, Dawson County, Montana, and

Prairie County, Montana, in the above entitled action, by and through the undersigned, its attorneys, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment of the Court entered in the said action on November 24, 1948, and to the whole thereof, except the sum of Seven Hundred Fifty-eight Dollars (\$758.00) awarded to the Yale heirs, and the sum of Four Hundred Twenty-five Dollars (\$425.00) awarded to the Scottish American Mortgage Company or its successors or assigns, which said judgment was duly given, made and entered in favor of the defendant bondholders and against the defendant counties.

Dated this 7th day of December, 1948.

/s/ D. C. WARREN,

/s/ E. W. POPHAM,

Attorneys for Defendants and Appellant Dawson County, Montana.

/s/ CECIL N. BROWN,

Attorney for Defendants and Appellant Prairie County, Montana.

(Acknowledgment of Service.)

[Endorsed]: Filed Dec. 10, 1948.

[23]

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[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Notice of appeal having been heretofore duly given and filed herein, Dawson County, Montana,

and Prairie County, Montana, Defendants and Appellants in the above entitled action, by and through the undersigned, their attorneys, in accordance with Rule 75(a) of the Federal Rules of Civil Procedure, hereby designate the contents of the record on appeal in said cause to include the following documents to wit:

1. Transcript of record filed in the United States Circuit Court of Appeals for the Ninth Circuit December 4, 1947 together with original exhibits filed under order of said Court.

2. Certified tax deed proceedings filed June 14, 1948.

3. Supplemental transcript of record filed September 1, 1948.

4. Motion to adopt findings of fact and conclusions of law lodged with the Clerk by Dawson County, Montana, November 10, 1948.

5. Findings of fact lodged with the Clerk by the bondholders November 10, 1948.

6. Proposed judgment filed November 10, 1948.

7. Findings of fact adopted by the Court and judgment entered November 24, 1948.

8. Notice of appeal filed December 10, 1948.

9. Designation of record on appeal filed December 10, 1948.

10. Proof of continuation of appeal bond filed December 10, 1948.

The Clerk of the above named Court is hereby respectfully requested under his hand and seal to certify and transmit to the Circuit Court of Appeals



in and for the Ninth Circuit true copies of the documents described as follows, to wit:

1. Motion to adopt findings of fact and conclusions of law, by Dawson County, Montana.

2. Findings of fact by bondholders, and judgment.

3. Entry showing findings of fact and conclusions of law made by Court and judgment entered pursuant thereto filed November 24, 1948.

4. Notice of appeal.

5. Designation of record on appeal.

6. Proof of bond payment.

within forty days from the date of notice of appeal or within such further time as shall be allowed therefor.

Dated this 8th day of December, 1948.

/s/ D. C. WARREN,

/s/ E. W. POPHAM,

Attorneys for Defendants and Appellant Dawson County, Montana.

/s/ CECIL N. BROWN,

Attorney for Defendants and Appellant Prairie County, Montana.

(Acknowledgment of Service.)

[Endorsed]: Filed Dec. 10, 1948.

[25]

PROOF OF PAYMENT OF BOND ON  
APPEAL PAYMENT

Taylor-Tipling and Company

Insurance Bonds

Power Block Annex

Helena, Montana, October 25, 1948.

Hildebrand & Warren,

Glendive,

Montana.

Date: 10/25/48.

Company: National Surety Corp.

Policy Number: Bond 1013700.

Form of Insurance: Appeal Bond for Dawson  
County, Montana, U.S.A. vs. Paul T. Markey.

Premium: \$10.00.

Paid 11/5/48. Taylor-Tipling & Co. By Chas.  
Day.

[Endorsed]: Filed Dec. 10, 1948.

[26]

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[Title of District Court and Cause.]

NOTICE OF APPEAL

(Cross Appeal—Second Appeal)

Notice is hereby given that the defendants Mary Hagen and E. B. Clark and Minnie R. Evans, on their own behalf and on behalf of all bondholders of the Upper Glendive-Fallon Irrigation District,

defendants herein, appeal to the Circuit Court of Appeals for the Ninth Circuit from the judgment of the District Court herein rendered and entered on November 24, 1948, as to portions thereof as follows:

I.

From that portion thereof whereby the sum of \$758.00 awarded on the tract known as the Yale Tract No. 1-27 was ordered and adjudged to be paid to Edna Yale, Alan W. Yale and Ruby Yale, his wife, Ruth Pettersen and Hans K. Pettersen, her husband.

II.

From that portion thereof whereby the sum of \$425.00 awarded on Tracts Nos. 1-47 and 1-53 was ordered and adjudged to be paid to the Scottish American Mortgage Company or its successors or assigns.

III.

From that portion thereof whereby it was ordered, adjudged and decreed that Messrs. O'Neil and Leonard were denied attorneys' fees as against the compensation or funds on deposit or to be deposited with the Registry of said Court excepting only as to those bondholders expressly represented by them.

This is a cross appeal and second appeal from

the appeal heretofore taken by Dawson County and Prairie County, Montana.

Dated this 23rd day of December, 1948.

P. F. LEONARD,

DESMOND J. O'NEIL,

Attorneys for said defendants, Appellees and Cross Appellants.

[Endorsed]: Filed Dec. 27, 1948.

[27]

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[Title of District Court and Cause.]

**BOND FOR COSTS ON CROSS-APPEAL**

Whereas, the defendants, Mary Hagen, E. B. Clark and Minnie R. Evans have filed or are about to file a second appeal or cross-appeal to the Circuit Court of Appeals for the Ninth Circuit from the judgment of the above entitled District Court rendered and entered on November 24, 1948, as to certain portions of said judgment and they desire to give and file with their notice of appeal a bond for costs on appeal as required by law,

Now Therefore, the said named cross-appellants as principals and the undersigned persons as sureties, in consideration of the premises and of said cross-appeal, do hereby jointly and severally bond themselves in the sum of \$250.00 to the Appellants Dawson County, Montana, and Prairie County, Montana, and the Appellees in the above entitled action.

The condition of this bond is that the said cross-appellants as principals and the said sureties shall pay the costs awarded against them if the said cross-appeal is dismissed or the said portions of



the judgment affirmed and such costs as the Appellate Court may award if the judgment is modified.

Dated December 23, 1948.

MARY HAGEN,  
E. B. CLARK,  
MINNIE R. EVANS,  
Principals.

By P. F. LEONARD,  
Their Attorney.  
J. E. ARNOLD,  
JOS. N. EZLA,  
Sureties.

[Endorsed]: Filed Dec. 27, 1948.

[28]

State of Montana,  
County of Custer—ss.

The said sureties who executed the foregoing bond being by me, duly sworn each for himself says:

I am a resident and householder within the State of Montana and I am worth over the sum of \$250.00 mentioned in the foregoing bond as the tender thereof over and above all my just debts and liabilities exclusive of property by law exempt from execution.

J. E. ARNOLD,  
JOS. N. EZLA.

Subscribed and sworn to before me this 23rd day of December, 1948.

(Seal)

DANIEL G. KELLY,

Notary Public for the State of Montana. Residing  
at Miles City, Montana. My Commission expires  
July 6, 1949.

[29]

[Title of District Court and Cause.]

STATEMENT OF POINTS UNDER CROSS-  
APPEAL, RULE 75(d)

The points upon which the cross appellants intend to rely upon the cross-appeal are:

I.

The District Court was unauthorized to exclude from the Upper Glendive-Fallon Irrigation District the Yale Tract No. 1-27 and the Court, without authority, deprived the bondholders of their lien on said lands and their rights to compensation in the sum of \$758.00.

II.

The District Court was unauthorized to exclude from the Upper Glendive-Fallon Irrigation District the Scottish American Mortgage Co., Ltd., Tracts Nos. 1-47 and 1-53 and the Court, without authority, deprived the bondholders of their lien on said lands and their right to compensation in the sum of \$425.00.

III.

That all bondholders have received the benefit of the services rendered by attorneys D. J. O'Neil and P. F. Leonard, and all bondholders should share in the reasonable expense of this litigation and a reasonable attorneys' fee should be allowed and charged against all bondholders pro-rata.

Dated this 23rd day of December, 1948.

P. F. LEONARD,

DESMOND J. O'NEIL,

Attorneys for said Defendants, Appellees and  
Cross Appellants.

[Endorsed]: Filed Dec. 27, 1948.

[30]

[Title of District Court and Cause.]

### DESIGNATION OF ADDITIONAL RECORD

The cross appellants respectfully request that in addition to the designation of portions of the record on appeal made by the appellants Dawson County and Prairie County, Montana, that the cross appeal or second appeal served and filed herein be included in said record together with the statement that a bond for costs on appeal, as required by law, has been filed with the notice of cross appeal and that the said record also include the statement of points under said cross appeal.

Dated December 23, 1948.

P. F. LEONARD,  
DESMOND J. O'NEIL,

Attorneys for said Defendants, Appellees and  
Cross Appellants.

[Endorsed]: Filed Dec. 27, 1948.

[31]

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Clerk's Docket Entry Showing Mailing of Copy of  
Notice of Appeal; and Copy of Notice of Cross-  
Appeal.

Dec. 10, 1948. Mailed copy notice of appeal from Judgment entered Nov. 24, 1948, to Counsel: P. F. Leonard, Miles City, Mont., for bondholders.

Dec. 27, 1948. Mailed copy of notice of Cross-Appeal by Mary Hagen, et al, bondholders, from Judgment of Nov. 24, 1948, to: D. C. Warren, Glendive, Montana, attorney for Dawson County, Montana. Cecil N. Brown, Terry, Montana, attorney for Prairie County, Montana. Edna Yale, Alan

W. Yale and Ruby Yale, Moscow, Idaho. Ruth Peterson and Hans K. Petterson, Moscow, Idaho. A. W. Roeh, 71½ Broadway, Fargo, North Dakota, attorney or assignee for or of Scottish American Mortgage Company. [32]

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[Title of District Court and Cause.]

### CLERK'S CERTIFICATE

United States of America,  
District of Montana—ss.

I, H. H. Walker, Clerk of the United States District Court in and for the District of Montana, do hereby certify the foregoing volume, consisting of 33 pages, numbered consecutively from 1 to 33 inclusive, to be a full, true and correct transcript of all portions of the record in case 348, United States of America vs. Paul T. Markey, et al, designated by the parties as the supplemental record on appeal therein, as appears from the original records and files of said Court in my custody as such Clerk.

I further certify that the costs of said Supplemental Transcript amount to the sum of Fourteen and 90/100ths (\$14.90) Dollars; \$7.50 of which has been paid by the Appellant, Dawson County, Montana, and \$7.40 by Cross Appellants, Mary Hagen, et al.

Witness my hand and the seal of said Court at Great Falls, Montana, this 4th day of January, A. D. 1949.

(Seal)

H. H. WALKER,  
Clerk as aforesaid.



[Endorsed]: No. 11821. United States Court of Appeals for the Ninth Circuit. Dawson County, Montana and Prairie County, Montana, Appellants, vs. Mary Hagen, E. B. Clark, Minnie R. Evans and United States of America, Appellees. Mary Hagen, E. B. Clark and Minnie R. Evans, Appellants, vs. Edna Yale, Allen W. Yale, Ruby Yale, Ruth Petterson, Hans Petterson, Scottish American Mortgage Company, Limited, United States of America, Dawson County, Montana and Prairie County, Montana, Appellees. Supplemental Transcript of Record. Appeals from the United States District Court for the District of Montana.

Filed January 7, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for  
the Ninth Circuit.

United States Circuit Court of Appeals  
For the Ninth Circuit

No. 11821

DAWSON COUNTY, MONTANA, and  
PRAIRIE COUNTY, MONTANA,  
Appellants,

vs.

MARY HAGEN, et al.,

Appellees.

STATEMENT OF POINTS  
AND DESIGNATION

Appellants intend to rely on this appeal on the contentions that the District Court of the United States for the District of Montana, being the trial court below, erred:

1. In failing and refusing to adopt as its findings and conclusions, the conclusions of law and findings of fact requested by appellants in writing, to wit: Its requested findings of fact numbered I to IX, both inclusive, and its conclusions of law numbered I and II, both inclusive lodged with the Clerk on November 10, 1948.

2. In adopting the appellees requested findings of fact and conclusions of law.

3. In its findings of fact No. 5 on pages 4, 5 and 6, paragraph 2 thereof, the statement,

“It is evident that Dawson County was over paid on said tracts the sum of \$3,315.06, and Prairie County, the sum of \$327.86.”

which statement is erroneous and contrary to the evidence and the agreements between the parties

under which lands embraced in this action were acquired by the government at a fixed consideration for a total acreage.

4. In finding of fact No. 8, page 7, paragraph 2, the statement, "That all tax deeds were taken on December 11, 1939 contrary to the record" (Transcript, page 97) which shows certain tax deeds taken in 1931 cover lands within the district.

5. In finding of fact No. 9, the statement by the County Clerk in the notice of sale is incomplete in failing to show that none of the lands involved herein were sold under the proposed Resolution and Notice. (Transcript pages 52-58).

6. In finding of fact No. 12, the statement is erroneous in that the negotiations for the sale of said lands were completed, the acreage fixed and the price fixed prior to the institution of the present action which was brought by the United States to quiet title. (Transcript pages 103-104).

7. Conclusion of Law No. 1, page 10 is not supported by the authorities quoted in *State ex rel Malott v. Board of County Commissioners*, 89 Mont. 37 296 Pac. 1, the said question was not before the court for a decision and the statements therein made are obiter dicta. In *Toole County Irrigation District v. Moody*, 125 F (2) 498, the *Malott* case was mentioned as authority for the proposition that in Montana bonds of an irrigation district were not general obligations but a mere charge on the land.

8. Conclusion of Law No. 2, page 10, paragraph 2, the conclusion of the court as to the meaning of

Chapter 63 of the Laws of 1937 is erroneous in that the Supreme Court of Montana decided to the contrary in the cases of *Cascade County v. Weaver et al*, 108 Mont. 1 90 Pac. (2) 164, and *State ex rel City of Billings v. Osten*, 91 Mont. 76, 5 Pac. (2) 562.

9. Conclusion of Law No. 5, paragraphs 1, 2, and 3, are contrary to the evidence which conclusively shows the counties sold fixed acreage of land for a fixed price prior to the institution of the present action and such agreements are binding upon both parties. (Transcript page 104).

10. In ordering judgment herein in favor of the appellee bondholders and against the appellant counties and in failing to order judgment for the appellants and against the appellees.

11. In rendering and entering final judgment on November 24, 1948, for the appellees and against the appellants.

The points of law upon which appellants intend to rely upon this appeal stated in general terms are as follows:

1. That the appellants obligated themselves by contract to sell to the United States the lands involved herein at a price fixed between the parties and such agreement is binding upon both parties.

2. That this action was brought to quiet title to the lands purchased by the United States from the appellants and the procedure taken was agreed upon and the compensation to be paid to the appellants stipulated prior to the institution of the action.



3. That the entry of judgment against the United States is contrary to law and the record which shows complete compensation agreed upon by the owners of the land was deposited in the registry of the court at the time the action was filed.

4. That there are no equity rules applicable to this action as the compensation was fixed by the United States and the owner of the lands which were free from all encumbrances under Montana law.

Appellants deem the entire record as certified to this court and now on file to be necessary for the consideration of the points and contentions above enumerated.

Dated this 29th day of December, A. D. 1948.

/s/ D. C. WARREN,

/s/ E. W. POPHAM,

Attorneys for Appellant.

Dawson County, Montana.

/s/ CECIL N. BROWN,

Attorney for Appellant.

Prairie County, Montana.

(Acknowledgment of Service.)

[Endorsed]: Filed January 3, 1949. Paul P. O'Brien, Clerk.

United States  
Court of Appeals  
for the Ninth Circuit

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UNITED STATES OF AMERICA,  
Appellant,  
vs.  
MARY HAGEN, et al.,  
Appellees.

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SECOND SUPPLEMENTAL  
Transcript of Record

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Appeal from the United States District Court  
for the District of Montana

FILED  
FEB 2 - 1919

PAUL R. OGDEN, N

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United States  
**Court of Appeals**  
for the Ninth Circuit

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UNITED STATES OF AMERICA,  
Appellant,  
vs.  
MARY HAGEN, et al.,  
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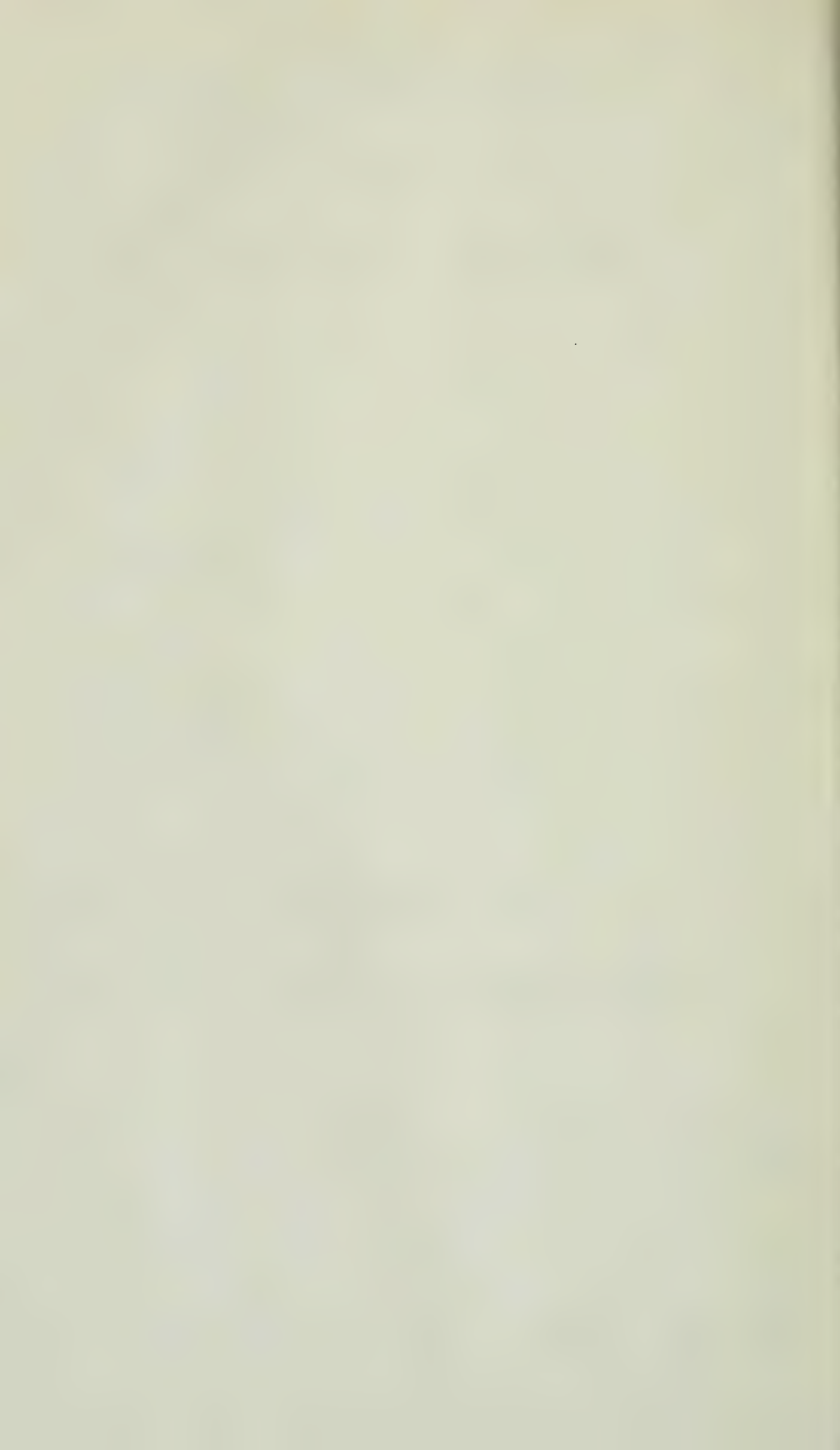
SECOND SUPPLEMENTAL  
**Transcript of Record**

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Appeal from the United States District Court  
for the District of Montana

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In the United States District Court for the District  
of Montana, Billings Division

Civil No. 348

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PAUL T. MARKEY, et al.,

Defendants.

NOTICE OF APPEAL

To the Clerk of the Above-Entitled Court:

Notice Is Hereby Given that the United States of America, plaintiff above named, through the undersigned, its attorneys, appeals to the United States Court of Appeals for the Ninth Circuit from that part of the judgment of the Court entered in the said action on November 24, 1948, which purports to order the United States to pay the further sum of \$3,642.92 with interest thereon at the rate of 6 per cent per annum from July 11, 1944, until paid.

Dated this, the 17th day of January, 1949.

JOHN B. TANSIL,

Attorney of the United States, in and for the District of Montana.

J. F. MEGLIN,

Special Assistant to the United States Attorney for the District of Montana.

[Endorsed]: Filed January 18, 1949.



(Clerk's Docket entry of mailing copies of Notice of Appeal by United States of America, to certain parties:)

Jan. 18, 1949—Mailed copies of Notice of Appeal by United States of America from Judgment of November 24, 1948, to D. C. Warren, Glendive, Montana, attorney for Dawson County, Montana; to Cecil N. Brown, Terry, Montana, Attorney for Prairie County, Montana; to P. F. Leonard, Miles City, Montana, Attorney for Bondholders; to Edna Yale, Moscow, Idaho; and to A. W. Roen, Fargo, North Dakota.

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[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF  
RECORD ON APPEAL

Pursuant to Rule 75, Federal Rules of Civil Procedure, the United States of America designates the following portions of the record to be contained in the record on appeal to the United States Court of Appeals for the Ninth Circuit in the above-entitled cause:

1. Notice of appeal filed January 17, 1949, by the United States of America, from judgment filed November 24, 1948.

2. This designation.

JOSEPH F. MEGLEN,  
Special Assistant to the United  
States Attorney.

[Endorsed]: Filed Feb. 19, 1949.

In the District Court of the United States in and for  
the District of Montana

United States of America,  
District of Montana—ss.

### CLERK'S CERTIFICATE

I, H. H. Walker, Clerk of the United States District Court for the District of Montana, do hereby certify that the annexed and foregoing, consisting of four pages, numbered consecutively from 1 to 4, inclusive, constitute a correct supplemental transcript of all portions of the record in case Numbered 348, United States of America vs. Paul T. Markey, et al., designated by the United States of America as the Supplemental Record on Appeal thereon, as appears from the original records and files of said Court in my custody as such Clerk.

I further certify that the costs of said Supplemental Transcript of Record amount to the sum of Thirty Cents (30c) and have been made a charge against the United States.

Witness my hand and the seal of said Court at Great Falls, Montana, this 19th day of February, A.D. 1949.

(Seal)

H. H. WALKER,  
Clerk as aforesaid.

[Endorsed]: No. 11821. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Mary Hagen, et al., Appellees. Second Supplemental Transcript of Record. Appeal from the United States District Court for the District of Montana.

Filed February 23, 1949.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.









